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Title/Style of Cause: Reinaldo Figueredo Planchart v. Venezuela  
Doc. Type: Report  
Decided by: Chairman: Helio Bicudo;  
First Vice-Chairman: Claudio Grossman;  
Second Vice-Chairman: Juan Mendez;  
Commissioners: Marta Altolaguirre, Peter Laurie, Julio Prado Vallejo  
Commission Member, Robert K. Goldman, refrained from participating in the  
discussion and vote on the instant report.  
Dated: 13 April 2000  
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## I. SUMMARY

1. The petition alleges the violation by the Venezuelan Government of the rights protected by the Convention of Mr. Reinaldo Figueredo Planchart in the investigation and prosecution of charges against him, for the crimes of misappropriation and embezzlement of funds. The violations charged are of Article 5 (1), (2) and (4) (Right to Humane Treatment); Article 8 (1), (2) (b), (d), (f), (h) and (5) (Fair Trial); and Article 25 (1) (Judicial Protection) in relation to Article 1 (1) (Obligation to Respect Rights) of the Convention. The Commission was asked to rule on suspension of execution of the warrant issued for the arrest of Mr. Figueredo, and, in the event of his conviction, on suspension of his extradition and incarceration until the Commission decided on the merits of the case. The Government moved for dismissal on the grounds that domestic remedies had not yet been exhausted. The Commission disallowed that motion and declared the case admissible on September 28, 1998, during its 100th regular session. In Report on Admissibility N° 81/98 the Commission placed itself at the disposal of the parties with a view to reaching a friendly settlement of the matter. The petitioner agreed to that procedure but the Government failed to send any observations to the report or to reply to the Commission's offer. By note of March 8, 1999, the Commission reiterated its offer to the Government of Venezuela giving it a period of 30 days to reply, further indicating to it that "if no such reply is received by the deadline set the Commission will continue to process this case." In continuing its processing of the case and following an examination of the factual and legal grounds put forward by the parties, the Commission finds that the Venezuelan Government responsible for violation of the rights enshrined in the American Convention that were set out by the petitioner in his complaint of May 23, 1994, with the exception of the right to humane treatment where the Government was not found responsible. Consequently, the Commission recommends that the Venezuelan Government vacate the prosecution of Reinaldo Figueredo Planchart, rescind the warrant issued

for his arrest, and grant him a new trial with full guarantees of due process. Furthermore, the Government must provide adequate and timely compensation to Reinaldo Figueredo Planchart, including just satisfaction for the human rights violations established herein.

## II. PROCESSING BY THE COMMISSION

2. On May 23, 1994, the Inter-American Commission on Human Rights (hereinafter "the Commission") received a petition alleging violation by the Republic of Venezuela (hereinafter "the Government," "the Venezuelan Government" or "Venezuela") of the rights of Mr. Reinaldo Figueredo Planchart protected in the American Convention on Human Rights (hereinafter "the Convention").

3. The Government's reply was received on August 12, 1994. On October 4, 1994 a questionnaire was sent to the parties with a request that it be filled out. The replies from the petitioner and the Government were received on December 16, 1994, and January 2, 1995, respectively. Additional information arrived from the petitioner on August 26, 1995. The Commission received the observations of the Government on November 22, 1995. On January 18, 1996, the petitioner submitted to the Commission a contingent request for Precautionary Measures. On August 1, 1996, a reply to the Government's remarks and a complementary complaint were received from the petitioner. The Commission received additional information from the Government on February 6, 1997, and from petitioner on February 20, 1997, and April 20, 1998.

4. On September 28, 1998, the Commission adopted Report on Admissibility N° 81/98, which was forwarded to the Government on October 15, 1998. Through that report, the Commission placed itself at the disposal of the parties with a view to reaching a friendly settlement of the matter on the basis of respect for the human rights recognized in this Convention pursuant to Article 48 (1) (f) of the Convention and 45 of its Regulations. Accordingly the Commission granted the parties a period of two months in which to reply to its offer. By note of December 14, 1998, the petitioner Douglass Cassel thanked the Commission and accepted its proposals. That note was transmitted to the Government on December 22, 1998. The Commission repeated its offer to the Government in a note dated March 8, 1999. The Government did not reply to the Commission's offer of friendly settlement.

5. During its 104th Regular session, the Commission examined the instant case and adopted Report N° 85/99 under Article 50 of the American Convention on Human Rights. This report was conveyed to the Government on October 13, 1999. The Government made no observations to the report and failed to comply with the recommendations of the Inter-American Commission on Human Rights.

6. The Commission in the course of its 106th regular meeting again examined the present case and approved Report N° 20/00 pursuant to Article 51 of the American Convention on Human Rights. The report was sent to the State and the petitioners on March 7, 2000 with the admonition of confidentiality until the Commission might approve its publication. The Commission gave Venezuela one month to resolve this situation. The term expired and the State neither implemented the Commission's recommendations nor responded in any way to the

report. Therefore, on April 13, 2000 the Commission agreed to publish this report and include it in its Annual Report to the General Assembly of the Organization of American States

### III. POSITIONS OF THE PARTIES

#### A. The petitioners

7. The complaint asserts that the Venezuelan Government has violated rights of Reinaldo Figueredo Planchart that are protected by the Convention. The Supreme Court of Justice ordered Mr. Figueredo arrested for trial on a charge of misappropriation of funds and embezzlement while he was Minister of the Presidential Secretariat and Minister of Foreign Affairs.

8. It is alleged that in the course of that proceeding his right of defense was violated by the Office of the Comptroller General of the Republic of Venezuela. That Office conducted a "documentary investigation" into the use made of budgetary funds assigned to expenditures for Government security in 1989 and concluded that there was evidence of commission of the crimes of misappropriation and embezzlement. The report named Mr. Figueredo as one of the presumed culprits. That document was the basis of a summary proceeding before a tribunal.

9. It is complained that the Office of the Comptroller General did not advise Mr. Figueredo that he was being investigated, did not inform him of the evidence being used against him, gave him no opportunity to defend himself or to present evidence, and refused him a copy of the report incriminating him though it had sent it to the Attorney General and to a court, and did not reply to his request for the opening of an "administrative inquiry" into the charge against him in accordance with due process of law.

10. The complaint states that the Attorney General violated Mr. Figueredo's right of defense by summoning him informally, arraigning him on criminal charges before the Supreme Court of Justice on the primary basis of the Comptroller General's report without letting him know the evidence on which it was based or giving him an opportunity to contradict it, and denying him access to the text of the charge and of the Comptroller General's report on which the action was based.

11. It is complained that the Supreme Court of Venezuela violated Mr. Figueredo's right of defense, of appeal, and not to be subjected to cruel and inhuman treatment.

12. On May 20, 1993, the Supreme Court declared that there were sufficient grounds to try then Deputy Figueredo based on the constitutional provisions for the criminal indictment of certain public officials (the President of the Republic, Senators and Deputies). The petitioner states that, on the strength of this ruling of the Court, Mr. Figueredo was not permitted to know the evidence against him or to defend himself; that in its decision, based on the report of the Comptroller General's Office, the Court had ruled that there was evidence of commission of the crimes of misappropriation and embezzlement--but did not specify what that evidence was or the crimes for which he was to be tried. The result of the Court's decision was that Mr. Figueredo was brought to trial, stripped of his parliamentary immunity, and removed from his position as a Deputy to the Nation's Congress.

13. The Supreme Court decided to try Mr. Figueredo (along with President Carlos Andrés Pérez and Senator Alejandro Izaguirre) directly, in a proceeding which rules out appeals. Once the proceeding was under way, the Court denied Mr. Figueredo access to the evidence against him, as well as the right to present evidence and enter pleas, and to take any action in his own defense. That summary phase ended with the issuance of an order for his arrest without bail.

14. The Court took his testimony in a secret hearing: the only persons present were the representatives of the prosecuting attorney and officers of the Court itself. His lawyer was not allowed to be present. The Court did not permit the defendants to appoint an attorney or defender, or do anything to state their case to the Court, to submit evidence or to present any request until the warrants for their arrest had been issued. The petitioner notes the Court's pronouncement that until that happened, they could not be regarded as on trial, even though they had each been indicted, individually and by name, by order of the Court itself.

15. A year after the opening of the trial the Court ruled that the commission of crimes of misappropriation and embezzlement had been proven and that there was well-founded evidence of the guilt of the accused. It ordered that he be held in custody until and during the actual trial. The petitioner claimed that "there is no charge or evidence to cast the slightest doubt on my personal honesty and integrity."

16. In addition, the petitioner alleges that under the law and the jurisprudence of the Court release on bail can never be granted to any person on trial for crimes under the Law on Protection of Public Assets, which meant that he would remain in confinement for the duration of the trial. He also described the dangerous conditions prevailing in Venezuelan prisons.

17. The petitioner charges that the Supreme Court violated his right of defense in not permitting him to know what he was accused of or on what evidence, in not permitting him to appoint a defender or attorney, or to act, present evidence or pleadings or make petitions at any stage of the proceeding that prompted the warrant for his arrest, and in subjecting him to interrogation without the presence of defending counsel or of any impartial third party.

18. Against the Government's assertion that the charge and its supporting documents had been delivered to him between the preliminary proceedings and the investigation, the petitioner maintains that "at that time the documents were delivered to former President Pérez, but not to Mr. Figueredo, who had no access to those documents until a year later, after the investigation."

19. The petitioner complains of violation of his right to appeal the judgments handed down against him and "the order that he be subjected to inhumane punishment without even having been sentenced by ordering his arrest without bail at grave danger to his physical and moral integrity."

20. In his complementary accusation the petitioner alleges that the Court's independence "may reasonably be supposed to be questionable."

21. It is alleged that the Political and Administrative Chamber of Venezuela's Supreme Court violated the petitioner's right to due process.

22. Having found it impossible to defend himself against the imputations against him in the report of the Office of the Comptroller General, on November 10, 1993, the petitioner, acting through his agent, filed a motion for nullification of that report with the Political and Administrative Chamber of the Supreme Court. At this writing the Chamber has not ruled on the question even though the procedural deadline for doing so has run out and despite the effect that such a ruling would have on the trial itself. On that occasion he filed an appeal for protection ("amparo") of the constitutional rights violated by that report. Nine months after it was filed, the appeal for "amparo" was disallowed.

23. The petitioner complains that in the court proceedings the judges of that Chamber participated in the decision to order his arrest and failed to pass on the appeals filed. The petitioner also charges unwarranted delay and denial of justice.

24. In consequence, the petitioner has asked the Commission to investigate the violation by the Government of Venezuela of his rights under Article 5 (1, 2 and 4) and 8[1, 2 (b), 2 (d), 2 (f), 2 (h) and 5], 24 and 25 of the Convention. He calls on the Commission "to order, as an urgent precautionary measure, suspension of execution of the warrant for my arrest in order to avert irreparable injury to my physical and moral integrity and to allow me to come forward at liberty, subject to due assurances and guarantees, to exercise my right of defense in the proceedings against me, and to advise the Government of Venezuela accordingly."

25. At the same time, he has asked the Commission to appeal urgently to the Inter-American Court of Human Rights order as a precautionary measure "suspension of execution of the warrant for his (my) arrest in order to avert irreparable injury to his (my) physical and moral integrity and to allow him (me) to come forward at liberty, subject to due assurances and guarantees, to exercise his (my) right of defense in the proceedings against me, and notify the Government of Venezuela accordingly."

26. Subsequent to his original complaint, the petitioner filed with the Commission a Contingent Request for Precautionary Measures in which he requested that, "in the event that the Supreme Court of Venezuela finds him guilty in the criminal proceeding to which the present petition relates, to pass a resolution recommending ad interim precautionary measures."

27. In that eventuality the precautionary measure requested is as follows:

A resolution in which the Commission recommends that, if Mr. Figueredo is found guilty by the Supreme Court of Venezuela in the criminal proceeding to which this petition relates, his sentence of extradition or imprisonment not be carried out until the Commission has resolved the serious issues of violations of due process in this case now pending before the Commission.

28. In his complementary complaint the petitioner also asks the Commission "to recommend that Mr. Figueredo be compensated for the damages caused by violation of his rights, including-- but not limited to--loss of employment since the opening of the investigation; to recommend that

Venezuela reform its laws and procedures to guard against a recurrence of such violations, including--but not limited to--assurance that the right of defense applies as much in the preliminary proceedings as in the trial..."

## B. THE GOVERNMENT

29. The Government alleges that the complaint is inadmissible because the remedies under domestic jurisdiction have not yet been exhausted.

30. The Government states that petitioner was not informed of the charge against him because "it cannot be concluded that the accused must in every case be provided with a copy of the charge or of its appended documentation."

31. The prosecutor asserts that delivery of a complete copy of the complaint is compulsory only in proceedings to determine responsibility for crimes not punishable by death, personal restraint or penal servitude. "It must be remembered that in this case the accused was charged with the crimes of misappropriation and embezzlement, for which the Organic Law on Protection of Public Assets imposes personal restraint or imprisonment."

32. The Government's position is that "the action instituted against Citizen Reynaldo Figueredo Planchart is proceeding in strict compliance with the legal order enshrined in the Constitution and the laws of the Republic."

33. The guarantees set forth in Article 8 of the Convention are not applicable to the proceeding known as "a preliminary hearing on merits," which is neither a trial nor "a proceeding to determine responsibility of any kind," but rather to produce a ruling on whether a trial should follow. "To give those judicial guarantees effect in the preliminary hearing would vitiate it and turn it into something else."

34. The proceeding followed in the present case was not an "administrative inquiry" but a "judicial review," the aim of which is "not to punish but to acquire information from which a punitive proceeding might emerge":

The case of Mr. Figueredo is one of involvement by association, owing to the close connection with the case brought against former President of the Republic Carlos Andrés Pérez. Because of this particular situation, the fact that the case is being tried before the highest bench in the Republic is a constitutionally established functional prerogative that serves as a guarantee deriving specifically from the need to protect the majesty of the office of President of the Republic and the incumbent in that august position at the start of the trial. This guarantee is recognized and established in many constitutional systems which, even though it may give rise to criminal proceedings that are not subject to appeal, have nevertheless not in international justice been deemed to violate human rights even in cases of the trial by association of officials of lower rank than those protected by this prerogative, such as that of Mr. Reinaldo Figueredo Planchart today.

35. The Government alleges that Mr. Figueredo voted without demurral for the lifting of his parliamentary immunity; that he was given in good time information on the charge against him so that he could use it in his defense in the "trial," in the current proceeding against him before the Supreme Court of Justice; that the charge was delivered to him along with its supporting documents after the preliminary hearing, and before the opening of the investigation; that "as an additional guarantee for the accused, he is not being tried by a one-judge court or a chamber, but by the entire bench – all fifteen members of the Supreme Tribunal of the Republic."

36. The Government states that the preliminary hearing on merits is not a proceeding to determine responsibility, but an event incidental to the trial on the substance of the charge:

It is, of course, a single-court trial, but as such is exactly the same as the single-court trial to which the Venezuelan Government could be subjected if the Inter-American Commission on Human Rights were to decide to bring action against it before the Inter-American Court of Human Rights... The hearing on merits does not determine responsibility, but merely actionability, and is hence incidental to the trial on the substance of the charge. And it is evident and manifest that in the trial of the complainant there have been no procedural delays, that is, no obvious denial of justice, and it is also clear that his lawyers are active participants in the proceedings...

37. The Government asks the Commission to disallow the complaint:

The Government requests that the complaint presented be disallowed on the grounds that a) domestic remedies have not been exhausted; b) the complaint relates to the enjoyment of a privilege of public office, not to any abridgement of a civil right such as that of defense, which in any case is guaranteed and being fully exercised by him at present before the Supreme Court of Justice; c) the assertion that the prosecution's charge and its supporting documents were not delivered to him in time for use in his defense is false; d) the dubiousness of his statement that the purpose of the preliminary hearing on merits was to arbitrarily divest him of his parliamentary status, when it has been shown that his immunity was lifted with his own affirmative vote, and that he was then removed by majority vote from the Chamber of Deputies in light of the findings of the Supreme Court so that he could be called to account for alleged criminal acts based on the principle of accountability by which citizens and Government officials are bound; e) his manifest distortion of the procedural aspects of his trial in deliberately confusing the preliminary stages of the trial (in which defense is not yet called for) with those parts of the proceeding devoted to controversy in which he may bring such arguments and evidence as he deems necessary in defense of his interests; and finally, f) the unquestionable fact that his lawyers are now acting in full diligence and publicity, without obstacles of any kind, in a trial that, having proceeded with all speed and procedural rigor, has now reached the stage when judgment is pronounced.

38. On February 6, 1997, the Commission received from the Government a note announcing that on May 30, 1996, "the Supreme Court of Justice of Venezuela, sitting in plenary, found citizen Reinaldo Figueredo Planchart guilty of the crime of aggravated generic misappropriation..." Mr. Figueredo (who was tried in absentia) "was prosecuted for the crimes of aggravated embezzlement and misappropriation, the trial culminating in the stated verdict, and

there are no other remedies of internal jurisdiction to be interposed against that decision, because it was handed down by the High Tribunal as provided in Article 211 of the Venezuelan Constitution."

#### IV. ANALYSIS

##### A. Competence of the Commission and formal requirements of admissibility

39. The Commission is competent to consider the petition in question inasmuch as it concerns violations of rights recognized in the American Convention. The petitioner may legitimately appear, and the events alleged in the petition are said to have taken place when the obligation to respect and enforce the rights established in the Convention was already in force for the Venezuelan Government[FN2]. In addition, the Government had already accepted the contentious jurisdiction of the Inter-American Court of Human Rights when the events occurred[FN3].

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[FN2] Venezuela ratified the American Convention on Human Rights on August 9, 1977.

[FN3] Venezuela acceded to the contentious jurisdiction of the Inter-American Court of Human Rights on June 24, 1981.

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40. The Commission declared the instant case admissible at its 100th Regular session by means of Report N° 81/98 of September 28, 1998. In the operative part of that report the Commission decided the following:

1. To declare the present case admissible.
2. To notify the Venezuelan Government and the petitioner of this decision.
3. To continue its examination of the merits of the case.
4. To make itself available to the parties for the purpose of reaching a settlement based on respect for the rights protected in the American Convention, and to invite the parties to go on record regarding this possibility within 2 months.
5. To publish this report and include it in its Annual Report to the OAS General Assembly.

41. The Government objected, alleging that domestic remedies have not yet been exhausted, on which basis the Commission should declare the petition inadmissible. However, the Commission rejected that argument in its report on admissibility in light of a note from the Venezuelan Government itself dated February 6, 1997, in which it stated, inter alia, that on, "May 30, 1996, the Supreme Court of Justice of Venezuela, sitting in plenary, found citizen Reinaldo Figueredo Planchart guilty of the crime of aggravated generic misappropriation..." Mr. Figueredo, who "was tried in absentia, was prosecuted for the crimes of aggravated embezzlement and misappropriation, the trial culminating in the stated verdict, and there are no other remedies of internal jurisdiction to be interposed against that decision, because it was handed down by the High Tribunal as provided in Article 211 of the Venezuelan Constitution."

42. Consequently, the Commission considered that the requirement of exhaustion of domestic remedies established in Article 46 of the Convention had been met and declared the instant case admissible.

43. As to timeliness of presentation, the Commission -in Report N° 81/98- found that the petition was lodged within the six-month period laid down in Article 46(1)(b) of the American Convention and considered that the subject matter of the petition was neither pending in another international proceeding for settlement, nor was substantially the same as one previously studied by the Commission or by another international organization. Accordingly, the requirements set out in Articles 46(1)(c) and 47(1)(d) of the above-cited international instrument were also met.

B. Points of law raised in the instant case

44. Having established the positions of the parties and reached a decision on the issues pertaining to admissibility and the competence of the Commission, the latter must study the evidence adduced by both parties, in order to determine if the Government bears international responsibility for the alleged violations of rights enshrined in the American Convention. In that context, the Commission deems it necessary first to examine some of the statements made by the parties in the instant case. In one of its communications to the Commission, the Government declared *inter alia*, "I duly remind you that on May 30, 1996 (...) the Supreme Court of Justice of Venezuela, sitting in plenary, found citizen Reinaldo Figueredo Planchart guilty of the crime of aggravated generic misappropriation, categorized in Article 60 of our Organic Law on Protection of Public Assets, and sentenced him to a term of two years and four months imprisonment and to the accessory punishments to imprisonment laid out in Article 104 of the same law."

45. The Commission does not have authority to issue its opinion on the nature or seriousness of the criminal offence imputed to the alleged victim. It takes note of the submissions of the Government in respect of these points and declares, as it has done on previous occasions, that, "In democratic societies, where the courts function according to a system of powers established by the Constitution and domestic legislation, it is for those courts to review the matters brought before them. Where it is clear that there has been a violation of one of the rights protected by the Convention, then the Commission is competent to review. The Commission has full authority to adjudicate irregularities of domestic judicial proceedings which result in manifest violations of due process or of any of the rights protected by the Convention." [FN4]

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[FN4] IACHR, Report N° 39/96, Case 11.673, Santiago Marzioni vs. Argentina, October 15, 1996, p. 93, paras. 60 and 61, in 1996 Annual Report, OEA/Ser.L/V/II.95, Doc. 7 rev, March 14, 1997.

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46. In light of these considerations, the Commission will determine the legal consequences of the facts that it regards demonstrated as being under the framework of its competence. Furthermore, it will signal whether or not the Government bears responsibility for violation of the Convention. However, it will not examine the declarations of the parties on the alleged criminal responsibility of the supposed victim, which is a matter for the domestic jurisdiction.

47. In that context it is important to stress that the organs of the American Convention have competence, pursuant to Article 33 thereof, to determine if the acts or omissions of any organ of government, the judicial branch included, entail their responsibility in accordance with the international obligations assumed in good faith upon ratification of the aforesaid international instrument.[FN5] Accordingly, the Commission has full authority to determine if in a given proceeding whether the judicial guarantees provided in Articles 8 and 25 of the American Convention were respected. An assessment as to whether a judicial proceeding satisfies the requirements of Articles 8 and 25 must be based on the circumstances of each particular case and on an examination of the proceeding as a whole.[FN6]

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[FN5] See IACHR, Report N° 43/96, Case 11.430, (Mexico), October 15, 1996, p.585, in 1996 Annual Report, OEA/Ser.L/V/II.95, Doc. 7 rev., March 14, 1997.

[FN6] See case law of the European Court of Human Rights: Barberá, Messegue and Jabardo Case, Judgment of 6 December 1988, Series A, N° 146, para. 83; Asch Case, para. 26; and Delta Case, para. 35.

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C. Considerations on merits

I. SUMMARY OF THE DIFFERENT STAGES OF THE TRIAL OF REINALDO FIGUEREDO PLANCHART UNDER DOMESTIC JURISDICTION

48. The record shows that the then-Deputy Reinaldo Figueredo Planchart learned from a number of news reports in the mass media that the Office of the Comptroller General of the Republic was conducting an investigation in which he was implicated in the crimes of generic misappropriation and embezzlement of funds in February 1989, while he was Minister of the Presidential Secretariat under the government of then-President of the Republic, Carlos Andrés Pérez.

49. Based on this information, Reinaldo Figueredo Planchart sent a formal communication dated May 7, 1993, to the Comptroller General of the Republic. In reply to that note, the Comptroller General advised Reinaldo Figueredo Planchart by official letter of May 17, 1993, of an "essentially documentary investigation" that he had opened ex officio, "for which no citizen was required to appear or give testimony..." and that he considered that he had "furnished him with all the information that [he was] legally able to provide, inasmuch as, by Official Letter N° 92-2733 dated December 1, 1992, the Superior Tribunal for the Protection of Public Assets notified this Office of the Comptroller General, that the report of November 26, 1992 and its annexes, have become bound up in a preliminary criminal proceeding and that, accordingly, their contents must be kept in the utmost secrecy." [FN7]

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[FN7] The communication from the Comptroller General of the Republic of May 17, 1993 stated inter alia, "In reply I inform you that on November 10, 1992, this agency opened ex officio an investigation into the use and disposal of the sum of two hundred and fifty million bolivars (Bs.

250.000.000.00), charged to the item " Budget Rectification" of 1989 and allocated to the Interior Ministry to cover Government defense and security expenditures, in accordance with Resolution N° 87 of the Central Budget Office, published in Official Gazette N° 34.166 of February 24, 1989. The aforesaid investigation was carried out in pursuance to Articles 234 of the Constitution, 1 of the Organic Law of the Office of the Comptroller General of the Republic, and 25 and 30 of the Organic Law on Protection of Public Assets, which conferred upon this agency wide powers of investigation and oversight on all acts in connection with public assets. In the present case, the Office of the Comptroller General of the Republic did not conduct an administrative inquiry, in conformity with the procedure provided in and governed by Chapter III, Title VI of its Organic Law, but, rather, an essentially documentary investigation, for which no citizen (public official or private individual) was required to appear or give testimony, but which collected information from bodies and entities that had been involved in the use and disposal of those public resources. That investigation culminated in a report dated November 26, 1992, plus 11 annexes thereto, which were conveyed to the Superior Tribunal for the Protection of Public Assets in response to that tribunal's request, inasmuch as it had opened an investigation into the same matter, and to the Attorney General of the Republic in view of the circumstantial evidence that emerged from that investigation. From the foregoing, I consider that I have furnished you with all the information that I am legally able to provide to you, inasmuch as, by Official Letter N° 92-2733 dated December 1, 1992, the Superior Tribunal for the Protection of Public Assets notified this Office of the Comptroller General, that the report of November 26, 1992 and its annexes, have become bound up in a preliminary criminal proceeding and that, accordingly, their contents must be kept in the utmost secrecy. Sincerely, José Ramón Medina, Comptroller General of the Republic.

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50. In a note of May 26, 1993, to the Comptroller General of the Republic, Reinaldo Figueredo Planchart requested, inter alia, that he "order the opening of an administrative inquiry as provided in Article 81 of the Organic Law of the Office of the Comptroller General of the Republic, based on your express declaration that circumstantial evidence emerged from the investigation carried out by the Organ over which you preside." The record shows that this request never received a reply from the Comptroller General of the Republic.[FN8]

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[FN8] The pertinent portions of the communication from Reinaldo Figueredo Planchart mention, inter alia, the following: "In Chapter III, Title VI of the Organic Law of the Office of the Comptroller General of the Republic (On Administrative Inquiries), Articles 81 to 92 set out the procedure to be followed in the above-cited inquiries of an administrative nature, Articles 81 to 83 immediately hereinabove stating that "the Office of the Comptroller General may carry out investigations, in all cases where there emerges circumstantial evidence that public officials or private individuals... have engaged in acts, events, or omissions contrary to a legal provision or regulation..." (Article 81), to which end a "non-contentious proceeding shall be instituted, which would end in a decision of acquittal, dismissal or responsibility for administrative wrongdoing..." (Article 82), and where that agency, "having opened the inquiry, shall gather testimonies, expert opinions, reports and any other evidence it deems necessary to clarify the facts of the matter. If, in the course of that activity, circumstantial evidence were to emerge incriminating a person, the Office of the Comptroller General shall summon him, in order to testify within ten (10) calendar

days from the date of the summons, on which occasion it shall take his testimony and inform him of the charges against him..." (Article 83). The Organic Law on Protection of Public Assets is in accordance with the foregoing provisions, inasmuch as Articles 25, 26 and 30 thereof provide that the Office of the Comptroller General of the Republic has competence to investigate in all proceedings connected with public assets, and shall order the opening of the respective inquiry for carrying out such acts as may be necessary acts to substantiate criminal or civil responsibility. The foregoing clearly shows that these investigations which the Comptroller's Office is empowered to carry out must be conducted in the procedural framework of an administrative inquiry and must observe all the formalities provided for in the law in question, the spirit, purpose and reason of this provision being clearly to establish responsibility for administrative acts and evidence to support possible charges of a civil or criminal nature. Failure to abide by the aforesaid procedure would render it void and, therefore, violate the right of defense set forth in Article 68 of the Constitution, in accordance with Article 83 of the Organic Law Organic Law of the Office of the Comptroller General of the Republic. It should be noted that the fact that the aforementioned procedure was not observed carries with it the procedural consequence that that investigation lacks the evidentiary value ascribed to it by Article 57 of the Organic Law on Public Assets; I wish to inform you that I will submit as much in my defense before the Supreme Court of Justice."

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51. On November 13, 1992, the Superior Tribunal for the Protection of Public Assets had also, based on the information reported in the press, opened ex officio a preliminary inquiry to investigate the presumed commission of a publicly actionable criminal act. The record shows the testimony given by Reinaldo Figueredo Planchart, along with his interrogatory conducted by that tribunal on March 4, 1993. The record also shows that the aforesaid tribunal did not allow the attorney who was accompanying Mr. Figueredo to be present during the interrogatory.[FN9] Furthermore, it is proven that in its decision on the substance of the case of May 30, 1996, the Supreme Court of Justice took account of and valued that interrogatory, stating, inter alia, that "this testimony shows that (...) this defendant clearly and evidently does not admit any direct guilt whatsoever in respect of the charges, but rather declares to know nothing about the actions of the Directors of Administration and Services of the Ministry of the Presidential Secretariat and of the Interior Ministry. These submissions by Reinaldo Figueredo Planchart are completely and utterly false"[FN10] The record before the Commission also shows that the Superior Tribunal for Protection of Public Assets questioned Reinaldo Figueredo Planchart while he still enjoyed parliamentary immunity in his capacity as Deputy to the Congress of the Nation.[FN11]

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[FN9] Article 68 of the Venezuelan Constitution provides, inter alia, that "the right of defense is inalienable at every stage and level of a proceeding."

[FN10] Supreme Court of Justice, Judgment of May 30, 1996, p.716, ff. 232-241.

[FN11] Article 144 of the Constitution provides that "Any court that takes cognizance of charges or complaints made against a member of the Congress, shall carry out the necessary preliminary proceedings and refer them to the Supreme Court of Justice for the purposes set out in Article 215, Clause 2 of this Constitution. If the court finds that there are grounds to proceed with the cause, no trial may take place until the criminal suspect is stripped of his immunity by the respective Chamber or by the Delegated Committee." For its part, Article 165 of the Code of

Criminal Trial Procedure in force for the events that comprise the subject matter of the instant case, states that "all Venezuelans and foreigners who are not legally prevented from doing so are under obligation to appear in response to any summons that may be issued in any matter of a criminal nature, in order to declare what they know in answer to any questions put in respect thereof by the official in charge of the preliminary proceeding or by the court trying the case." Articles 166 and 168 of the same law provide that "exemption from appearing in response to the summons in the foregoing Article, but not from giving testimony, is granted to.... members of the Nation's Congress; furthermore, those persons covered in Article 60, clause 4 of the Constitution are not required to give testimony in the cases determined thereby." Article 60 (4) of the Venezuelan Constitution recognizes that "no person may be obligated to take an oath or be compelled to be a witness against himself or to plead guilty in a criminal proceeding against him..."

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52. The investigation of the Comptroller General of the Republic culminated on November 26, 1992, in a report with 11 annexes, which was conveyed to the Superior Tribunal for the Protection of Public Assets in response to that tribunal's request, inasmuch as it had opened an investigation into the same matter, and to the Attorney General of the Republic. As the communication from the Comptroller of May 17, 1993, shows, those investigations were carried out without the testimony of the suspect and without allowing him access to the report once it was concluded.

53. On March 11, 1993, the Attorney General of the Republic filed ex officio an indictment and a request for a preliminary hearing on merits with the Supreme Court of Justice against the then-President of the Republic, Carlos Andrés Pérez and Congressmen Alejandro Izaguirre and Reinaldo Figueredo Planchart, former Ministers of the Interior and of the Presidential Secretariat, respectively, for the criminal offences of generic misappropriation and embezzlement of funds.

54. The Supreme Court of Justice, sitting in plenary, examined on March 16, 1993, the request for a preliminary hearing on merits and indictment brought by the Attorney General of the Republic and decided to refer the respective record to the Trial Court.

55. The request for a preliminary hearing on merits and indictment of the Attorney General of the Republic were admitted on March 17, 1993. At the prosecutor's request it was decided to ask the Superior Tribunal for the Protection of Public Assets for a certified copy of the file of case N° 92-2713. The Supreme Court, sitting in plenary, took receipt of those certified copies on March 23, 1993, and decided to add them to the record.

56. On March 30, 1993, the Supreme Court of Justice sitting in plenary acknowledged receipt of the records of preliminary proceeding conducted by the Superior Tribunal for the Protection of Public Assets contained in the file of case N° 92-2713.

57. The Commission observes in the record of the case sub lite copies of the newspapers El Nacional of May 5, 1993, and of El Universal of May 6, 1993, setting out the proposed judgment of the Supreme Court of Justice citing the grounds for prosecuting the persons charged by the Attorney General of the Republic.

58. The record shows the decision of the Supreme Court of Justice of May 11, 1993, denying the request of one of the co-accused, Alejandro Izaguirre, who asked "very respectfully, that the court order me to be issued with copies of the prosecutor's complaint and of its accompanying documents since failure to comply with such a requirement could result in the absurd circumstance of a decision issued inaudita altera pars, in contravention of express constitutional provisions, such as that relating to the right of defense...."[FN12]

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[FN12] The decision of the Supreme Court of Justice denying one of the co-accused a copy of the indictment of the Attorney General of the Republic consisted, inter alia, of the following: "The Court, in reaching its decision, finds that: Having reviewed the points of view applied thus far with respect to whether, in the special procedure of the Preliminary Hearing on Merits provided for in Article 361 et seq. of the Code of Criminal Trial Procedure and Article 146 et seq. of the Organic Law of the Supreme Court of Justice, it is in accordance with the law to provide the accused with a "a complete copy of the complaint and of the documents that accompany it," and with respect to the timeliness of doing so, that there are various precedents with different solutions. The Court considers that the best criterion is that which holds that the provision contained in Article 369 of the Code of Criminal Trial Procedure is only applicable when it has been previously declared that there are grounds for prosecution, in other words, that the above constitutes subject matter pertaining to the trial and not to the preliminary hearing."  
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59. On May 20, 1993, the Supreme Court of Justice, sitting in plenary, declared that there were sufficient grounds for prosecution of the citizens Carlos Andrés Pérez Rodríguez, the then-President of the Republic; Alejandro Izaguirre Angelli, Senator of the Republic, who, at the time of the events, held the position of Interior Minister; and Reinaldo Figueredo Planchart, Deputy to the Nation's Congress, who, at the time of the events, held the position of Minister of the Presidential Secretariat. On that same date this court advised the Congress of the Republic of its decision.

60. In its decision of May 26, 1993, the Supreme Court of Justice decided, inter alia, "In accordance with the provisions contained in Article 369 of the Code of Criminal Trial Procedure, the court orders that a complete copy of the indictment and of its accompanying documents be transmitted to the accused citizen Carlos Andrés Pérez Rodríguez." The record does not show that that decision was also adopted in respect of the other accused persons, one of whom is Reinaldo Figueredo Planchart.

61. On May 27, 1993, the Chamber of Deputies decided to strip Reinaldo Figueredo Planchart of his parliamentary immunity.[FN13]

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[FN13] The record before the Commission contains the summary of the debates held in the Chamber of Deputies of the Congress of the Republic of Venezuela on May 27, 1992. During those proceedings the then-Deputy Reinaldo Figueredo Planchart addressed the parliament saying, inter alia, the following: "Mr. Speaker, Fellow Deputies, the Supreme Court of Justice

has announced that there are grounds for my prosecution based on the complaint brought against me by the Attorney General of the Republic in connection with the case of the 250 million bolivars of the so-called secret entry of the Interior Ministry. Given that Article 144 of the Constitution provides that, quote, "... no trial may take place of any member of Congress until the criminal suspect is stripped of his immunity by the respective Chamber...", unquote, I come on this -for me- disagreeable occasion, to support the opinion of the Special Committee chaired by Deputy Gustavo Tarre Briceño and to ask you to vote for removal of immunity, as I myself will do. (...) The Supreme Court of Justice has decided that there are grounds for my prosecution. I have yet to receive any notice of that decision, of which I have learned through the media. (...) I also found out through the media that the Superior Tribunal for Protection of Public Assets had opened an investigation (...) I came forward of my own accord, in order to collaborate and to give information to that tribunal. To my surprise I was deposed as a criminal suspect, in spite of the fact that Articles 143 and 144 of the Constitution contain express provisions relating to immunity. Once again through the media I heard that the Supreme Court of Justice had instituted a preliminary hearing on the merits of the charges brought against me in an indictment filed by the Attorney General of the Republic. I was not informed of the hearing, nor was I permitted to know the contents of the indictment, despite the fact that Article 8 of the American Convention on Human Rights, which has been ratified by Venezuela and is a Law applicable to the Republic and the Hemisphere, provides "... the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal..." Once more the media were the source of information that enabled me to know that the Office of the Comptroller General of the Republic had opened an inquiry into the events in which I appeared to be involved, and had issued a report, without ever having notified me or permitted me to defend myself, in spite of the provisions contained in the Organic Law of the Office of the Comptroller General of the Republic... (...) In my opinion it is inadmissible for a person indicted before the Supreme Court of Justice to be prevented from knowing the details of the proceeding instituted by the Attorney General of the Republic....(...) I do not accept the submission of the Office of the Comptroller General of the Republic that a report that it has drawn up against me as a criminal suspect indicted before the Supreme Court of Justice is covered by the secrecy of the preliminary proceeding, or that I should be here before you today in order to be stripped of my immunity on the false pretext that this report is secret and that I will only have access to it in my forthcoming trial! (...) However, now that a proceeding is about to be instituted before the highest Bench of the Republic, composed of the country's most renowned jurists, I trust that equanimity and good judgment will prevail. I am confident that this proceeding which has caught the attention not only of Venezuelan public opinion, but also of the legal opinion of the Hemisphere and the world, will provide cause for praising our country's justice system for its strict abidance by the rules of due process and its scrupulous respect for the right of defense, as provided for in our laws and enshrined in universally recognized standards for the protection of human rights. Should that be the case, I feel utterly sure that my reputation and good name, upon which doubt has been so unjustly cast, will remain free of any blemish. Mr. Speaker, in order to attempt this goal, and in keeping with what Deputy Gustavo Tarre Briceño has said, I ask that you vote in favor of lifting my parliamentary immunity."

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62. On June 8, 1993, the Supreme Court of Justice ordered that the trial underway of Carlos Andrés Pérez Rodríguez continue in conjunction with that of citizens Alejandro Izaguirre Angelli

and Reinaldo Figueredo Planchart, and with the trial of those other persons who merited prosecution for the same acts, until final judgment was rendered. The Commission observes that the Supreme Court of Justice cites Article 215(1) of the Constitution as legal grounds to combine the cases of Reinaldo Figueredo and Alejandro Izaguirre with that of Carlos Andrés Pérez, and to declare itself competent both to hear and to render final judgment on those cases.[FN14]

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[FN14] In its judgment on merits (pages 4 and 5) of May 30, 1996, the Supreme Court of Justice cited Article 215(1) of the Constitution which, to the letter, states the following: The Supreme Court of Justice has the power: 1.- To declare whether or not there are grounds to try the President of the Republic, or whomsoever acts in his stead, and, in the event of the affirmative, to continue, subject to authorization from the Senate, to hear the case and to render final judgment thereon."

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63. The record shows that on September 29, 1993, during the preliminary hearing stage, Reinaldo Figueredo Planchart gave informative testimony and was questioned by the Trial Court of the Supreme Court of Justice. The Commission also observes that Mr. Figueredo's defense counsel accompanied him to the Supreme Court, but was prevented from entering the courtroom where the interrogatory took place. Figueredo was questioned by the aforesaid court without the assistance of his defense counsel.

64. On November 10, 1993, Reinaldo Figueredo Planchart's attorneys filed a motion for nullification and an appeal of "amparo" with the Supreme Court of Justice, in order legally to invalidate the report of the Comptroller General of the Republic for having violated his rights of defense and to due process. In its decision of August 11, 1994, the Political and Administrative Chamber of the Supreme Court disallowed the appeal of "amparo," stating, inter alia, that "...this Chamber considers that it is impossible and unfeasible for the Comptroller General of the Republic, in carrying out the tasks of substantiation assigned to him by the Organic Law on Protection of Public Assets, to violate the rights of defense, to due process and to a fair trial, for the precise fact that those undertakings are phases prior to the start of judicial proceedings in which the participation of the interested parties goes without saying. Thus finds the court." [FN15]

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[FN15] Political and Administrative Chamber, Supreme Court of Justice, Decision of August 11, 1994.

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65. On November 16, 1993, the Supreme Court of Justice denied a request to exclude the Attorney General of the Republic from the proceedings before that court on the basis of ensuring a proceeding with full equality for the parties, since the defense did not have access to the minutes of the preliminary proceeding. The Supreme Court made clear its interpretation that the preliminary proceeding is secret and, therefore, the accused has access neither to the prosecutor's indictment, nor to the record of the preliminary proceeding, nor to a defense attorney during that stage of the proceedings. The aforesaid court said, inter alia, the following:

....in our Code of Criminal Trial Procedure the preliminary proceeding or inquiry is divided into two parts, phases or stages. The first starts with the order to proceed (Article 74 of the Code of Criminal Trial Procedure), and is entirely secret from the person or persons under investigation, but not from the Judge, the Head Court Clerk, and the clerks, or from the Prosecutor from the Attorney General's Office, who is legally required to take part in public action trials. The second stage or phase of the preliminary proceeding starts with issuance of the arrest warrant or of the indictment. The proceeding then ceases to be secret from the criminal suspect or defendant. Once the criminal suspect has been detained or the defendant notified, he may then be informed of the minutes of the preliminary proceedings with the assistance of a person or attorney of confidence (Article 73 in fine of the Code of Criminal Trial Procedure). Thereafter in the proceeding the person under investigation acquires the legal condition of a party thereto. In consequence thereof, he shall have access to the record of the preliminary proceeding and every means of defense that the law provides, the moment the respective arrest warrant is executed, in accordance with Article 60, clause 1, paragraph 2 of the Constitution.[FN16]

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[FN16] Article 60(1), second paragraph of the Constitution of Venezuela: The criminal suspect shall have access to the minutes of the preliminary proceeding and every means of defense that the law provides as soon as the respective arrest warrant is executed.

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Accordingly, this high tribunal cannot approve the request of the forenamed attorneys because they lack procedural capacity to take part in the present preliminary proceeding stage. Thus finds the court.[FN17]

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[FN17] Supreme Court of Justice, Proposed Report of Justice Ismael Rodríguez Salazar, pp. 7 and 8, Section 22, ff. 175-76), November 16, 1993.

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66. The record contains a dossier of press cuttings from the newspaper El Universal of April 15 and 30, 1994, in which is published part of the text of the proposed report of Supreme Court Justice Ismael Rodríguez Salazar, which contains the warrant for the arrest of Reinaldo Figueredo Planchart and the other co-accused.

67. On May 10, 1994, the attorneys for Reinaldo Figueredo Planchart filed a petition with the Supreme Court of Justice in which they denounce the leak and deny the imputations made by that tribunal through the media.

68. On May 18, 1994, the Supreme Court of Justice ordered the arrest for trial of Reinaldo Figueredo Planchart and the other co-accused "for the crimes of generic misappropriation and fraudulent embezzlement of funds, provided for in Articles 60 and 58, respectively, of the Organic Law on Protection of Public Assets..."[FN18] The record shows that that decision makes no allusion to the leaks to the media or to the petition filed by the accused's attorneys.

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[FN18] Supreme Court of Justice, May 30, 1996, p. 5, ff. 2 to 533, section twenty-four.

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69. On June 9, 1994, the Trial Court of the Supreme Court of Justice decided that, "having seen the request submitted by the defenders of the accused Reinaldo Figueredo Planchart, in which they ask that the date and time be set for presentation of the signed statement of their client, such request is denied on the ground that the aforementioned accused is not in court and the presentation of a signed statement is a strictly personal act reserved for the accused." [FN19]

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[FN19] Decision of the Trial Court of the Supreme Court of Justice, Case N° 0588, f. 64, Caracas, June 9, 1994

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70. On June 17, 1994, Trial Court of the Supreme Court of Justice issued a ruling in which it declared the preliminary proceeding concluded.

71. On June 21, 1994, the defense counsel for the accused requested the Trial Court of the Supreme Court of Justice for a complete ordinary copy of the record of case N° 0588 and all its annexes, given that said court had declared the preliminary proceeding concluded on the 17th day of that same month and year. On June 22, 1994, the aforesaid court stated that "[Having seen the request submitted by Dr. Carlos Armando Figueredo, in his capacity as provisional defense counsel for the accused Reinaldo Figueredo Planchart, dated the 21st day of the present month, the court decides to agree to that request. Let it be provided accordingly." [FN20] The record shows that this was the first time –following the conclusion of the preliminary proceeding and the issuance of the warrant for his arrest-- that Reinaldo Figueredo Planchart had access to the proceeding its record.

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[FN20] Trial Court of the Supreme Court of Justice, Case N° 0588, Caracas, June 22, 1994.

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72. On November 15, 1994, the Supreme Court of Justice set the public hearing of the accused for November 22, 1994. Reinaldo Figueredo Planchart was out of the country.

73. On February 15, 1995 the Supreme Court of Justice issued an order of attachment of the property belonging Reinaldo Figueredo Planchart and the co-defendants. Justice Rafael Alfonzo Guzmán dissented with that decision and declared to the media, in reference to the attachment order issued by the court, "that it was more for effect than actually effective, because criminal offenders of this kind never put their property in their own name; on the other hand, it is obvious that they possess works of art, corporate stocks, very powerful corporations that own all kinds of real estate, cash, foreign exchange, jewelry, none of which need be registered or certified by a notary in order to be transferred." The aforesaid Justice further noted, "that these measures are ineffective in this particular case and in all cases where a crime against public assets is concerned because precisely this type of offender and this type of crime have the effect of ensuring that

nobody keeps property of any significant value in their own name, in order to avoid its attachment specifically by this type of measure."[FN21] Justice Guzmán also issued the same statements on Friday, February 17, 1995, on the 8:00 p.m. news program on Canal 10, owned by the company TELEVEN.

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[FN21] El Universal, Caracas, February 16, 1995, p. 21.

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74. On March 30, 1995, the attorneys for the defense submitted to the Supreme Court a request for recusation of the justice who issued statements to the press. A few weeks after the request for recusation was made, that justice was elected President of the Supreme Court of Justice. The recusation was disallowed on May 8, 1995 by Justice Josefina Calcaño Temeltas, First Vice President of the Supreme Court of Justice.

75. The record contains a copy of the newspaper El Nacional of January 25, 1996, which published the transcript of a televised interview with the then-President of the Republic of Venezuela Rafael Caldera, who, in reply to question about the possibility of granting a pardon to one of the defendants, said, "I think that, while there may be a reasonably large sector who would wish that, the vast majority of the country would regard it as a kind of fraud, a kind of inconsistency, a failure to recognize the conviction that it behooves the Supreme Court of Justice to hand down, in accordance, apart from anything else, with the expectation that has formed in the minds of the Venezuelan public."[FN22]

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[FN22] El Nacional, Caracas, January 25, 1996, Section D, p. 1.

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76. The record contains a copy of the newspaper El Nacional of February 1, 1996, which published a statement by the then-Prosecutor General, Jesús Petit da Costa, which says, inter alia, that "the pressure on the Supreme Court of Justice is being exerted by those who (...) lodged and are pursuing a petition with the Inter-American Commission on Human Rights."[FN23]

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[FN23] El Nacional, Caracas, February 1, 1996.

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77. The record contains a copy of the newspaper El Nacional of April 19, 1996, its front page headline reading, inter alia: "Justice Luis Manuel Palis proposes four years imprisonment. The Justice in charge of submitting the proposed decision for approval by the other members (...) finds that there was aggravate misappropriation of funds, but dismissed the charges of embezzlement. (...) Reinaldo Figueredo would be sentenced to two years and four months imprisonment..."[FN24] Justice Luis Manuel Palís was the judge who proposed the decision in the case of Reinaldo Figueredo Planchart.

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[FN24] El Nacional, Caracas, April 19, 1996, p. 1.

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78. In its decision of May 30, 1996, the Supreme Court of Justice found Reinaldo Figueredo Planchart

guilty of the crime of aggravated generic misappropriation categorized in Article 60 of the Organic Law on Protection of Public Assets, which act was committed in the place, manner and time that have been shown, and sentenced him to a term of two years and four months imprisonment in the penal establishment that the National Executive Branch designates, and to the accessory punishments to imprisonment laid out in Article 104 of the Organic Law of Protection of Public Assets, which are: disqualification from participation in government for the duration of the conviction, and disqualification for the same amount of time from public office or posts. By the same token the court sentences the aforesaid accused to provide restitution, reparation or compensation for the damages inflicted on public assets, once the corresponding amount has been established by the expert appraisal that was ordered performed to that end. All the foregoing is in accordance with the provisions of Articles 60, 100 and 104, of the Organic Law for Protection of Public Assets, in respect of Article 37 of the Criminal Code, and the heading of Article 43 of the Code of Criminal Trial Procedure.[FN25]

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[FN25] Supreme Court of Justice, Judgment of May 30, 1996, p. 767, Caracas, Venezuela.

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## II. SCOPE OF APPLICATION OF THE AMERICAN CONVENTION IN THE PROSECUTION OF REINALDO FIGUEREDO PLANCHART IN DOMESTIC JURISDICTION

79. In a note of October 4, 1994, the Commission submitted for the consideration of the parties a questionnaire with several questions relating to the trial in Venezuela of Reinaldo Figueredo Planchart. Thus, the Commission asked, "In accordance with Article 8 of the American Convention, what is the scope of application of judicial guarantees in the instant case? Do they apply, for instance, to preliminary proceedings or to administrative proceedings?"

80. The Government, citing Article 215 (1) and (2) of the Constitution, as well as Articles 146 to 154 of the Organic Law of the Supreme Court of Justice, declared that a preliminary hearing on merits is neither a trial nor a proceeding to determine responsibility of any kind. The Government added that the Supreme Court of Justice does not institute judicial proceedings designed to incriminate or exonerate a person of a given act and that this stage is a functional prerogative established to protect high-ranking government officials against reckless lawsuits. Consequently, the Government concluded that the judicial guarantees enshrined in the American Convention do not apply during the stage of preliminary hearings on merits before the Supreme Court of Justice.

81. With respect to whether the aforementioned judicial guarantees apply to administrative proceedings, the Government declared that the American Convention only applies to

administrative proceedings for imposing punishment. The Government added that in Venezuelan law there is an accepted trend that judicial guarantees are applicable in administrative proceedings aimed at imposing punishments for administrative violations or offences; in particular, the principle of freedom from ex post facto laws on violations or offences, the principle of due process and, within that, the principle of the right of defense. Nevertheless, the Government also stated that in this case the judicial guarantees enshrined in the Convention do not apply on the ground that the administrative proceeding instituted by the Office of the Comptroller General of the Republic was not an administrative inquiry but a judicial review. The Government indicated that aim of the latter is not to punish but to acquire information from which a punitive proceeding might emerge. The Government further stated that since, in the opinion of the Office of the Comptroller General, that judicial review uncovered evidence of civil and criminal responsibility, which is not a matter for that office to resolve, the said agency referred the findings of that review to the Superior Tribunal for the Protection of Public Assets and to the Attorney General of the Republic.

82. The petitioners, for their part, stated that the guarantees contained in Article 8 of the Convention should apply both to administrative proceedings and to preliminary hearings on merits before the Supreme Court of Justice; particularly if the latter might result in punishments of a criminal nature. According to the petitioners, the Constitution and administrative law in Venezuela provide for due process, which has been denied in practice by the intervening administrative and judicial organs. The Government's submission that the Office of the Comptroller General of the Republic is an organ whose functions are exclusively administrative, which lacks the jurisdictional powers of the Judicial Branch, and which, for that reason, is excused from the duty to respect rights relating to judicial guarantees, is inconsistent with the obligations of the Government of Venezuela under the American Convention and its own domestic laws. The petitioners add that the Office of the Comptroller General carried out a "documentary investigation," on the basis of which the accused was deprived of his right of defense and his right to a fair trial in accordance with the guarantees of due process. The petitioners say that the rights violated by the investigation conducted by the Office of the Comptroller General were as follows: a) right of defense, b) access to an independent and impartial tribunal, c) right to due process, and d) access to the records of the proceeding.

83. Having summarized and studied the positions of the parties, the Commission must determine whether in the case sub lite the guarantees of due process [Articles 8 and 25] enshrined in the American Convention are applicable to the preliminary stages of the judicial proceeding instituted against the supposed victim. In connection therewith, the Commission observes that neither Article 8 nor Article 25 of the Convention establish at which stage of a proceeding to substantiate a criminal accusation the criminal suspect is entitled to exercise his rights of defense and to due process.

84. Nevertheless, the Inter-American Court has interpreted Articles 8 and 25 of the Convention as provisions that do not recognize any judicial guarantees, strictly speaking, but that contain the procedural requirements that should be observed in order to be able to speak of effective and appropriate judicial guarantees under the Convention.[FN26]

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[FN26] Inter-Am.Ct.H.R., Advisory Opinion OC-9/87 of October 6, 1987, Judicial Guarantees in States of Emergency (Series A), N° 9, para. 27, p.15.

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85. By the same token, the European Court of Human Rights, in analyzing Article 6(1) of the European Convention, which is similar to Article 8(1) of the American Convention, stated that "In a democratic society within the meaning of the Convention, the right to a fair administration of justice holds such a prominent place that a restrictive interpretation of Article 6 para. 1 (art. 6-1) would not correspond to the aim and the purpose of that provision." [FN27] This approach is consistent with the emphasis that the Inter-American Court gives to due process within the context of a democratic society. [FN28]

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[FN27] European Court of Human Rights, *Delcourt v. Belgium*, 1 E.H.H.R. 335, Judgment of 17 January 1970, para. 25, p.15. The Court held to the same interpretation in the Judgment of 26 October 1984, *De Cubber, A.86* (1984), para. 16.

[FN28] The Inter-American Court has declared that, "In a democratic society, the rights and freedoms inherent in the human person, the guarantees applicable to them and the rule of law form a triad. Each component thereof defines itself, complements and depends on the others for its meaning." Inter-Am.Ct.H.R., Advisory Opinion OC-9/87, *op.cit.*, para. 35.

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86. By the same reasoning, the European Commission of Human Rights established in the case of *Joseph Kaplan v. United Kingdom* that "...the law of the State concerned cannot limit the application of the European Convention on Human Rights. The autonomous nature of the protection afforded by Article 6(1) makes up for the shortcomings of the laws of the United Kingdom, which does not provide adequate protection to the same extent that other states party to the Convention do." [FN29] In reaffirming this interpretation, the European Court of Human Rights, in the case of *Feldbrugge v. The Republic of Holland*, decided that in respect of "... the applicability of Article 6 para. 1 (art. 6-1) and its specific judicial guarantees (...) Of course, it is equally essential that in the administrative field justice should be done." [FN30]

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[FN29] European Commission of Human Rights, *Joseph Kaplan v. United Kingdom*, Application 7598/76, 1981, ECC 297, 1982, 4 EHRR 64 - 17 July 1980. In this case the petitioner complained that a decision had been made in respect of certain rights and obligations without his having had a public hearing before a court, and that, in consequence thereof, his responsibility was substantially increased. The basic issue that the European Commission had to decide was the scope of application of Article 6 of the Convention. The European Commission established that the guarantees contained in Article 6 of the Convention may be extended to administrative proceedings, even though, they are not substantiated by judicial proceedings strictly speaking. All the above on the basis that they fulfill similar functions with effects on the civil rights of the petitioner.

[FN30] Eur. Ct. H. Rts., *Feldbrugge v. Netherlands*, Series A, N° 99, Application N° 8562/79, 8 EHRR 425, 29 May 1986. In this case Mrs. Feldbrugge relied on Article 6 para. 1 (art. 6-1) of the Convention. She claimed that, in the determination of her right to health insurance

allowances, she had not received a fair trial before the President of the Appeals Board. The European Court established that Article 6(1) was applicable in the present case since those guarantees apply to "private-law disputes in the traditional sense, that is disputes between individuals or between an individual and the State to the extent that the latter had been acting as a private person, subject to private law", and not "in its sovereign capacity." "The character of the legislation which governs how the matter is to be determined ... and that of the authority which is invested with jurisdiction in the matter are of little consequence": the latter may be an "ordinary court, [an] administrative agency, etc." The European Court underscored that, "Only the character of the right at issue is relevant."

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87. The Commission observes that both the case law of the European system for protection of human rights and that of the inter-American system clearly establish that States may neither limit nor restrict the application of the guarantees of due process to the final phase of a criminal proceeding, particularly if the preliminary phase has legal implications for the civil rights of the accused. Thus, for instance, the European Court and Commission consider that the following rights should apply to preliminary proceedings in a criminal trial: 1) the right to legal assistance of his own choosing;<sup>[FN31]</sup> the right to have adequate time and facilities for the preparation of his defense;<sup>[FN32]</sup> the right to defend himself<sup>[FN33]</sup> the right to be informed of the nature and cause of the accusation against him;<sup>[FN34]</sup> the right to examine witnesses;<sup>[FN35]</sup> the right to remain silent;<sup>[FN36]</sup> and the right to have the free assistance of an interpreter.<sup>[FN37]</sup> The generally recognized principal, as the European Court of Human Rights has stated, is that the guarantees of due process apply to proceedings prior to trial, including preliminary investigations, "if and in so far as the fairness of the trial is likely to be seriously prejudiced by an initial failure to comply with them."<sup>[FN38]</sup>

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[FN31] In *Can v. Austria*, App. N° 9300/81, 7 E. H. H. R. 421 (1984), the European Commission found that restrictions on communications with the attorney "during the initial months of the preliminary investigation" were in violation of the right of the petitioner to defend himself through legal assistance (para. 45, 61). In approving a subsequent settlement, the European Court noted that, "the Court's case law does already provide certain indications as to the answer to the question... whether and to what extent Article 6 para. 3 (art. 6-3), is applicable at the stage of the preliminary investigations." 8 E.H.H.R. para. 17 (1985). The Court later expressly recognized the right of defence through legal assistance in the preliminary phase in *S. v. Switzerland*, 14 E.H.H.R., 670, para. 46-48 (1991), and in *Imbrioscia vs. Switzerland*, 17 E.H.H.R., 441, para. 36 (Eur. Ct. H. Rts. 1993).

[FN32] *Engel v. The Netherlands*, 1 E.H.H.R. 647 in para. 91 (1976).

[FN33] *Ibid.*

[FN34] *Campbell and Fell v. United Kingdom*, 7 E.H.H.R., 165, paras. 95-99 (1984).

[FN35] *Delta v. France*, 16 E.H.H.R., 574, para. 36 (1990).

[FN36] *Funke v. France*, 16 E.H.H.R., 297 (1993), paras. 41-44.

[FN37] *Luedicke et al. v. Germany*, 2 E.H.H.R., 149, para. 48 (1978).

[FN38] *Imbrioscia v. Suiza*, 17 E.H.H.R., 441, para. 36, (1993).

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88. In keeping with this analysis, the position of the Venezuelan Government is clearly incompatible with the case law of the European and inter-American systems for protection of human rights, particularly if we take into account its submission that a person subject to its jurisdiction is not entitled to the guarantees of due process recognized by the Convention in the context of an administrative investigation[FN39] or in a preliminary hearing on merits conducted by the Supreme Court of Justice.[FN40] Nor may the Government invoke its domestic legislation to disavow these rights, inasmuch as, “[t]he protection of human rights, particularly the civil and political rights set forth in the Convention, is in effect based on the affirmation of the existence of certain inviolable attributes of the individual that cannot be legitimately restricted through the exercise of governmental power. These are individual domains that are beyond the reach of the State or to which the State has but limited access.”[FN41]

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[FN39] On various occasions the Venezuelan Government referred to this administrative investigation as a "judicial review" and a "documentary investigation."

[FN40] It is also important to stress that in the case of Lutz, Englert and Nolkenbockoff v. Federal Republic of Germany the European Court of Human Rights concluded that in order to ascertain whether or not the offence in issue belongs, according to the legal system of the respondent State, to criminal law, “the nature of the offence and (...) the nature and degree of severity of the penalty that the person concerned risked incurring must be examined, having regard to the object and purpose of Article 6 (art. 6) the nature of the offence and, finally, the nature and degree of severity of the penalty that the person concerned risked incurring must be examined, having regard to the object and purpose of Article 6 (art. 6),” of the European Convention, which is similar to Article 8 of the American Convention. “Having proceeded according to those principles, it concluded that the general character of the legal provision contravened by Mr. Öztürk and the purpose of the penalty, which was both deterrent and punitive, sufficed to show that the offence in question was, for the purposes of Article 6 (art. 6), criminal in nature.” “The Court points out that the second and third criteria adopted in the judgments in the Engel and Others case and the Öztürk case are alternative and not cumulative ones: for Article 6 (art. 6) to apply in virtue of the words “criminal charge”, it suffices that the offence in question should by its nature be “criminal” from the point of view of the Convention, as in the instant case, or should have made the person concerned liable to a sanction which, in its nature and degree of severity, belongs in general to the “criminal” sphere (see also the Campbell and Fell judgment of 28 June 1984, Series A no. 80, pp. 35-38, §§ 69-73),” in Eur. Ct. H. Rts., Lutz Case, Judgment of 25 August 1987, Case law 1984-1987, Cortes Generales, Madrid, Spain, p.1165. As in the above-cited case, the fact that a proceeding is in a preliminary phase --be it that of investigation, preliminary proceeding, or preliminary hearing on merits-- is immaterial under international law on human rights. What is important is to determine whether or not the alleged offence committed by the accused is of a criminal nature, as in the record --misappropriation and embezzlement of funds-- and if this offence also incurs a criminal penalty --Reinaldo Figueredo Planchart was sentenced to two year and nine months imprisonment by the SCJ. Accordingly, the guarantees of due process enshrined in Articles 8 and 25 of the Convention fully apply both to the administrative investigation and to the preliminary hearing on merits before the Supreme Court of Justice of Venezuela.

[FN41] Inter-Am.Ct.H.R., Advisory Opinion OC-6/86 of May 9, 1986, The Word "Laws" in Article 30 of the American Convention on Human Rights (Series A), para. 21, p. 11.

89. Having determined the scope of application of the Convention, the Commission must evaluate if the guarantees of due process to which Reinaldo Figueredo Planchart was entitled were actually violated by the Government of Venezuela in the different stages of the trial that ended with the final judgment issued by the Supreme Court of Justice.

### III. DUE PROCESS AND ACCESS TO DOMESTIC REMEDIES

#### [ARTICLES 8 and 25 OF THE CONVENTION]

90. In their original complaint the petitioners declared to the Commission that the Venezuelan Government violated, inter alia, Articles 8(1), (2)(b), (d), (f), (h), and 25 of the Convention to the detriment of Reinaldo Figueredo Planchart, as a result of the events that took place in Caracas, Venezuela, as from November 10, 1992, the date on which the Office of the Comptroller General of the Republic opened ex officio an administrative investigation that ended with a criminal trial before Supreme Court of Justice, which issued a conviction on May 30, 1996. According to the petitioners, the Government violated the guarantees of due process to which Reinaldo Figueredo Planchart was entitled by law during the administrative investigation stage, as well as during the Supreme Court's preliminary hearing on merits and investigation prior to the issuance of the warrant for his arrest.

91. The petitioners cite the following provisions contained in the Convention:

#### Article 8. Right to a Fair Trial

1. Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.

2. Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees:

b. prior notification in detail to the accused of the charges against him;

d. the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel;

f. the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts;

h. the right to appeal the judgment to a higher court.

5. Criminal proceedings shall be public, except insofar as may be necessary to protect the interests of justice.

#### Article 25. Right to Judicial Protection

1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

92. Article 8 of the American Convention establishes a series of procedural requirements that should be observed in order to be able to speak of effective judicial guarantees.[FN42] That Article enunciates rights and guarantees which are distinct but stem from the same basic idea and which, taken together, make up a single right not specifically defined but whose unequivocal purpose is ultimately to ensure the right of every person to a fair trial.[FN43] This right is a basic guarantee of respect for the other rights recognized in the Convention, due to the fact that it represents a limitation on the abuse of power by the State.[FN44]

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[FN42] Inter-Am.Ct.H.R., Advisory Opinion OC-9/87 of October 6, 1987, op. cit., para. 27.

[FN43] See European Court of Human Rights, Golder Case, Judgment of February 21, 1975, Series A, N° 18, para. 28, in relation to Article 6 of the European Convention on Human Rights, which essentially addresses the same rights and guarantees as Article 8 of the American Convention.

[FN44] The right to a fair trial is regulated in several articles of the Convention, namely, 7, 8, 9 and 25.

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93. Furthermore, it is essential to remember that both Article 8 and Article 25 of the American Convention "are necessary conditions for the procedural institutions regulated by the Convention to be considered judicial guarantees." [FN45] It should be mentioned that, "Guarantees are designed to protect, to ensure or to assert the entitlement to a right or the exercise thereof." [FN46] Article 25(1) [of the American Convention] incorporates the principle recognized in the international law of human rights of the effectiveness of the procedural instruments or means designed to guarantee such rights. [FN47] [F]or such a remedy to exist, it is not sufficient that it be provided for by the Constitution or by law or that it be formally recognized, but rather it must be truly effective in establishing whether there has been a violation of human rights and in providing redress. [FN48] In that sense the Court has concluded that, "A remedy which proves illusory because of the general conditions prevailing in the country, or even in the particular circumstances of a given case, cannot be considered effective." [FN49]

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[FN45] Inter-Am.Ct.H.R., Advisory Opinion OC-9/87, op.cit., para. 30.

[FN46] Inter-Am.Ct.H.R., Advisory Opinion OC-8/87 of January 30, 1987, Habeas Corpus in Emergency Situations (arts. 27.2, 25.1 and 7.6), para. 25.

[FN47] Inter-Am.Ct.H.R., Advisory Opinion OC-9/87, op.cit., para. 24.

[FN48] Idem, para. 24.

[FN49] Ibidem.

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94. Right to a natural judge and competent tribunal. Article 8(1) of the Convention provides, among other rights and guarantees, that every person has the right to a hearing (...) by a competent (...) tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him. The Inter-American Court, on examining the natural judge issue, declared, inter alia, that, "it is a basic principle relating to the independence of the judicature that every person has the right to be tried in the ordinary courts of justice in accordance with legally established procedures." [FN50]

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[FN50] Inter-Am.Ct.H.R., Castillo Petruzzi v. Peru, Judgment of May 30, 1999, para. 129.  
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95. The Commission observes in the record that the Supreme Court of Justice ordered on June 8, 1993, that the trial of the then-President of the Republic, Carlos Andrés Pérez, continue in conjunction with that of Reinaldo Figueredo Planchart, "and with the trial of those other persons who merited prosecution for the same acts, until final judgment is rendered." [FN51] The Supreme Court cited Article 215(1) of the Constitution as legal basis for making such a decision.

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[FN51] Supreme Court of Justice, Judgment of May 30, 1996, pp.4 and 5.  
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96. Article 215(1) of the Constitution de Venezuela states, to the letter, the following:

The Supreme Court of Justice has the power:

1. To declare whether or not there are grounds to try the President of the Republic, or whomsoever acts in his stead, and, in the event of the affirmative, to continue, subject to authorization from the Senate, to hear the case and to render final judgment thereon.

97. As can be observed, the constitutional provision, a norm of the highest rank, clearly establishes the procedure that the Supreme Court must follow in order to try the President of the Republic in a single-court proceeding ending with a final judgment. The Commission further finds that the Venezuelan Constitution leaves no void or legal loophole in respect of the procedure to follow when the defendant is a member of the Congress of the Republic, as Reinaldo Figueredo Planchart was. In the second clause of the same article (Article 215), the Constitution signals that the aforesaid court has the power:

To declare whether or not there are grounds to try members of the Congress, or of the Court itself, Ministers, the Attorney General, the Prosecutor General, or the Comptroller General of the Republic and, in the event of the affirmative, to refer the record to the competent ordinary court, should the offence be a common one, or, if the case concerns political crimes, to continue to hear the case and to render final judgment thereon, except as provided otherwise in Article 144 with respect to members of the Congress. [FN52] (emphasis added).

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[FN52] Article 144 of the Constitution states that "Any court that takes cognizance of charges or complaints made against a member of the Congress, shall carry out the necessary preliminary proceedings and refer them to the Supreme Court of Justice for the purposes set out in Article 215, Clause 2 of this Constitution. If the court finds that there are grounds to proceed with the cause, no trial may take place until the criminal suspect is stripped of his immunity by the respective Chamber or by the Delegated Committee."

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98. Given that the crimes with which Reinaldo Figueredo Planchart was charged were common ones --generic misappropriation and embezzlement of funds-- the Supreme Court, having decided that there were grounds to prosecute the accused, should have complied with the constitutional mandate and referred the record to the competent tribunal of the general jurisdiction --in this case, the Superior Tribunal for the Protection of Public Assets.

99. The Government itself confirmed the foregoing in its communication of January 23, 1996, when it said, *inter alia*, that:

Had the Superior Tribunal for the Protection of Public Assets determined that the claimant in his dual capacity as a former cabinet minister and a parliamentarian was implicated in the unlawful acts under investigation, by law the aforementioned court had the opportunity to try him, once the preliminary hearing on merits had been conducted and, as applicable, once the claimant had been stripped of his parliamentary immunity (Article 144 of the Constitution and Article 87 of the Organic Law on Protection of Public Assets).

100. The Commission does not share the Government's view that the Superior Tribunal for the Protection of Public Assets "had the opportunity to try him" given that the constitutional mandate was very clear: the Supreme Court of Justice may only try in a single-court proceeding ending with a final judgment a person who acts in the capacity of President of the Republic, but not a member of congress or parliamentarian. In the Commission's opinion, the Supreme Court of Justice encroached upon the jurisdiction that belonged to the Superior Tribunal for the Protection of Public Assets. Moreover, the latter should have acted as a court of first instance, so that the accused could appeal to a higher court if the decision was unfavorable to him. That was denied to him in practice by the Supreme Court, which tried him in a single-court proceeding that ended with the final judgment and conviction it issued on May 30, 1996.[FN53]

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[FN53] Although this aspect is examined further on in this report, it should be mentioned that Article 211 of the Constitution of Venezuela states the following: The Supreme Court of Justice is the highest Bench in the Republic. No appeals whatsoever shall be heard or admitted against its decisions.

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101. In consequence, the Commission finds that the Venezuelan Government violated Reinaldo Figueredo Planchart's right to a hearing by a competent tribunal in the substantiation of the criminal accusation against him, recognized in Article 8(1) of the Convention.

102. Right to a hearing by a tribunal with the guarantee of the right of defense and access to domestic remedies [articles 8(1), 8(2) (d), and 25(1) of the convention]. Article 8(1) of the Convention establishes the obligation of the courts of justice to provide a hearing, with the necessary guarantees, to every person who has had criminal charge made against him. One of these guarantees is that provided in Article 8 (2) (d) of the Convention, which states that the accused has the right to “defend himself personally or to be assisted by legal counsel of his own choosing.” By the same token, Article 25(1) of the Convention requires the State to provide for all persons subject to its jurisdiction a simple and prompt recourse for protection against acts that violate their fundamental rights. The Inter-American Court has declared that these Articles recognize the concept of “due process of law,” which includes the prerequisites necessary to ensure the adequate protection of those persons whose rights or obligations are pending judicial determination.”[FN54] The Commission also has stated, “To deny an accused access to the courts in order to assert his rights is to prevent him from obtaining remedies or receiving a trial based on the merits of the case and constitutes in effect a violation of the right to judicial protection guaranteed by Article 25 of the American Convention on Human Rights.”[FN55]

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[FN54] Inter-Am.Ct.H.R., Advisory Opinion OC-9/87 of October 6, 1987, op.cit., para. 28, p. 15.

[FN55] IACHR, Annual Report 1985-1986, Decision N° 28/86, Case 9190, Jamaica, April 16, 1986, OEA/Ser.L/V/II.68, Doc.8, rev.1, September 26, 1986, p. 81.

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103. In the light of these principles and having conducted a thorough examination of the proceeding, the Commission finds that from November 1992 –when the Government opened ex officio the investigation of Reinaldo Figueredo Planchart, which concluded with the conviction issued by the Supreme Court of Justice-- to June, 1994, when that tribunal agreed to grant him access to the record of the case on the basis that the secret preliminary proceeding had concluded and a warrant for his arrest had been issued, the accused was unable to exercise his right to a hearing by any administrative or judicial organ in the presence of his attorney. It is proven, furthermore, that during this crucial stage of the proceeding the accused was also not permitted to present evidence in his defense or to cross-examine witnesses called by the Government. Finally, the accused also received no prior notification of the charges against him. It is also proven that the few recourses that are permitted by Venezuelan positive law against a --single-court-- proceeding before the Supreme Court of Justice were attempted by the accused to no avail, since in the opinion of that court the right of defense may not be exercised in any of the stages prior to issuance of the arrest warrant, which –under Article 103 of the Organic Law on Protection of Public Assets-- does not permit release on probation or bail.[FN56]

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[FN56] Organic Law on the Protection of Public Assets, Article 103.- The measures in respect of imprisonment provided for in the instant Law shall be subject to effective compliance, including those that are merely preventive and those that result from transformation. Consequently, any persons who are prosecuted for the offences herein established or for offences connected thereto, shall enjoy neither the benefit of release on probation --that is release on bail from a secure prison-- established in the Code of Criminal Procedure, nor any such benefits provided in the

Probation Law (Ley de Sometimiento a Juicio y Suspensión Condicional de la Pena), or that are provided for in the Penal System Law in relation to release on probation or under supervision.

This provision, together with secret preliminary proceedings, was abolished upon promulgation of the new Organic Code of Criminal Procedure, which entered into force on July 1, 1999. Nevertheless, the Commission takes the view that the application of these provisions in this particular case has negative repercussions on the victim's right to a fair trial.

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104. Indeed, through his communication of May 17, 1993, the Comptroller General of the Republic confirmed to Reinaldo Figueredo Planchart that he had been under investigation since November 10, 1992, and that this "documentary investigation"--which ended with a report and 12 annexes-- did not require "any citizen to be summoned or to give testimony." On a later date the Comptroller also informed Figueredo that he was unable legally to give him further information because the report and its annexes had become bound up in a preliminary criminal proceeding, which, under Venezuelan positive law, was of a confidential nature. The Comptroller also informed Figueredo that this "documentary investigation" was legally grounded in Articles 234 of the Constitution; 1 of the Organic Law of the Office of the Comptroller General of the Republic; and 25 and 30 of the Organic Law on the Protection of Public Assets.[FN57] In response, Figueredo Planchart filed an appeal of "amparo" with the Supreme Court of Justice, which upheld the version of the Comptroller General upon stating that right of defense does not apply since this stage precedes the start of a judicial proceeding.[FN58]

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[FN57] Article 234 of the Constitution: "It devolves upon the Office of the Comptroller General of the Republic to control, monitor, and inspect the nation's incomes, expenditures and assets, as well as transactions in connection therewith. The law shall determine the organization and workings of the Office of the Comptroller General of the Republic, as well as the timeliness, nature and scope of its intervention."

Article 1 of the Organic Law of the Office of the Comptroller General of the Republic: "The Office of the Comptroller General of the Republic shall, in accordance with the law, control, monitor and inspect the nation's incomes, expenditures and assets, as well as any transactions in connection therewith."

Articles 25 and 30 of the Organic Law on Protection of Public Assets: Art.25: "The Office of the Comptroller General of the Republic has competence to investigate and inspect all acts connected with public assets. To that end it may carry out such inquiries as it deems necessary into the agencies and entities that are mentioned in Article 4 of this law ." Art.30: "The Office of the Comptroller General of the Republic is also competent to carry out all the necessary acts designed to substantiate criminal or civil responsibility. Having concluded its substantiation, it shall convey the results of its investigation to the Office of the Attorney General in order for the latter to adopt the pertinent measures."

[FN58] See the pertinent part of the judgment of the Political and Administrative Chamber of the Supreme Court of Justice, of August 11, 1994, para. 62 in the instant report.

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105. In spite of what the Comptroller and the Supreme Court of Justice said, the Commission finds that when the administrative authority addresses the criminal suspect giving the legal grounds for his position, he does so citing articles of laws that do, in effect, accord him competence to conduct the investigation that he did carry out, but he neglects to establish the legal grounds for the procedure he was required to follow. Moreover, none of the legal provisions cited by the Comptroller indicate the scope and procedure for his self-proclaimed "documentary investigation." However, Article 83 of the Organic Law of the Office of the Comptroller General of the Republic does clearly establish the following:

Having opened the inquiry, the office of the Comptroller General shall gather testimonies, expert opinions, reports and any other evidence it deems necessary to clarify the facts of the matter. If, in the course of that activity, circumstantial evidence were to emerge incriminating a person, the Office of the Comptroller General shall summon him, in order to testify within ten (10) calendar days from the date of the summons, on which occasion it shall take his testimony and inform him of the charges against him. If the person under investigation fails to appear to give testimony he shall be penalized in pursuance to Article 94 of this Law, without prejudice to the inquiry continuing in absentia (emphasis added).

106. As can be seen, the Organic Law of the Office of the Comptroller General of the Republic did establish a procedure to follow, and that procedure provided the person under investigation the right of defense, which, moreover, was compatible with the Regulations –not once cited, either by the Comptroller General or by the Government-- of the Organic Law of the Office of the Comptroller General, which states in Title IV (Procedures), Chapter V (Procedure in Administrative Inquiries) that:

Article 49. All inquiries carried out by the Office of the Comptroller General shall be secret, except from the criminal suspect, once he has been informed of the charges against him (...).

Article 52. The inquiry having been opened, such proceedings as are deemed indispensable shall be carried out. Once the latter have been conducted, the order shall be given to serve the presumed culprit with a summons in order to inform him of the charges against him and to hear his testimony. If the criminal suspect so requests, the Office of the Comptroller General shall grant him a period of not less than fifteen, nor more than forty-five, calendar days in which to respond to the charges, to present evidence and to submit such documents as he deems pertinent in order for them to be added to the record and to be taken into consideration in the decision on the matter.

107. On the issue of the right of defense, the legal doctrine of the Office of the Attorney General of Venezuela in relation to the Constitution and administrative litigation also confirms the above-cited procedure:

This right pertains to the classic principle of *audire alteram partem*, according to which a person affected by any potential administrative decision must receive a prior hearing, which presupposes participating in the proceeding, thereby acting with sufficient guarantees to defend himself (...). The principle of *audire alteram* is protected by the Constitution (Article 68 in fine)

[and, accordingly], a constitutional guarantee is violated when this principle is infringed by the administrative authorities in an investigation procedure.[FN59]

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[FN59] Instituto de Estudios Superiores del Ministerio Público, Doctrina Constitucional y Contencioso Administrativa 1977-1986, Publicación N° 12, Caracas, Venezuela, 1988, Oficio N° 14.854, pp. 123-127.

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108. By the same token, the Political and Administrative Chamber of the Venezuelan Supreme Court of Justice interprets the right of defense in the same way:

The right of defense should be regarded not only as the opportunity for the citizen on trial or alleged offender to ensure his pleas are heard, but also as the right to demand the Government's compliance, prior to imposition of any punishment, with a series of acts or proceedings designed to enable him to the exact nature of the charges against him, and the legal provisions applicable thereto; submit arguments in his defense; and to obtain and provide evidence in his favor. This perspective view of the right of defense is comparable with what other states that are governed by law have termed the principle of due process.[FN60]

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[FN60] Judgment of the Political and Administrative Chamber of the Supreme Court of Justice, November 17, 1983, in Revista de Derecho Público, N° 16, Caracas, Venezuela, p. 151.

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It establishes, as an implicit consequence of law, a constitutional duty for the competent official to provide hearings to the interested party before adopting a decision that affects his rights and interests.[FN61]

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[FN61] Judgment of the Political and Administrative Chamber of the Supreme Court of Justice, February 25, 1988 in Revista de Derecho Público, N° 33, Caracas, Venezuela, 1988, p. 90.

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109. In addition, the First Chamber for Administrative Disputes, in its judgment of July 7, 1988, stated that:

The hearing of the interested party, as a procedural act, is necessary and essential in so-called punitive proceedings, inasmuch as in these cases, through a hearing of the interested party, the justice administration formally apprises the person subject to the jurisdiction of the administrative tribunals of a proceeding against him based on an illegal act allegedly committed by the latter, which, if found to be true, would result in his punishment.[FN62]

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[FN62] Judgment of the First Chamber for Administrative Disputes, July 7, 1988, in Revista de Derecho Público, N° 35, Caracas, Venezuela, 1988, p. 91.

110. Clearly, both the provisions contained in the Organic Law of the Office of the Comptroller General and in the Regulations governing that Law, and Venezuelan case law on the subject of the right of defense, establish that the administrative authority was required to follow a procedure that went beyond the simple appearance of the person under investigation, since that procedure granted him a period of time in which to reply to the charges and to adduce evidence and other factors that would serve as a basis for the Comptroller General ultimately to adopt a decision in accordance to law. However, the Comptroller General, in violation of the rules of due process, carried out a one-sided investigation and drew up a report with 12 annexes, which served as grounds for convicting Reinaldo Figueredo Planchart in a judicial proceeding. Objective examination of the above-cited provisions clearly reveals that the intention of the lawmaker was to provide persons under investigation with a legal procedure that offered minimum guarantees of security. This protection functions in favor not only of the person under investigation but also of the public administration, which could easily be harmed by the absence of due process, which would utterly invalidate the proceeding and render any conclusion null and void.

111. In the case sub lite, it was not only the administrative authorities, but also the judicial authorities, that violated due process. Indeed, it is shown that Reinaldo Figueredo Planchart was questioned on two consecutive occasions during his trial without the assistance of an attorney. More serious still is that on both occasions the accused arrived at the courthouse accompanied by his defense counsel but the latter was barred from the courtroom by the judges. These events occurred on November 13, 1992, before the Superior Tribunal for the Protection of Public Assets, and on September 29, 1993, before the Trial Court of the Supreme Court of Justice.

112. The Inter-American Commission cannot consider these appearances to constitute effective observance of the right of the accused to a hearing by a tribunal, since the guarantees provided by the right of defense as enshrined in Article 8(2)(d) of the Convention were systematically violated by the courts. In the opinion of the Commission, these proceedings, in which the person under investigation appears without the assistance of an attorney at an interrogatory based on a case record with which he is not familiar and without knowing the nature of the criminal charges against him, do not constitute exercise of the right to a hearing by a tribunal as recognized in Article 8(1) of the Convention. To provide a hearing to a person under investigation implies permitting him to defend himself adequately, with the assistance of an attorney, in knowledge of all the evidence mounted against him; to provide him with a hearing is to permit him to be present at the examination of any witnesses that testify against him, to permit him to challenge their testimony, and to cross-examine them in order to discredit their incriminating statements as contradictory or false; to provide an accused with a hearing is to give him the opportunity to deny and to detract from the documents sought to be used against him. It is shown that the accused did not have access to these rights in all the stages prior to the issuance of the warrant for his arrest, which, in practice, prevented him from defending himself while at liberty. In other words, a warrant was issued for the arrest of Reinaldo Figueredo Planchart without his having been given a hearing with all the guarantees of due process in the substantiation of the accusation of a criminal nature made against him.

113. The aforementioned violations of due process were confirmed by the decision of the Supreme Court of Justice of November 16, 1993, whereby it established jurisprudence that runs contrary to the international obligations adopted by Venezuela upon its signing and ratification of the American Convention. Indeed, the aforesaid tribunal stated, inter alia, that once "the criminal suspect has been arrested (...) he may then be informed of the minutes of the preliminary proceedings with the assistance of a person or attorney of confidence. Thereafter in the proceeding the person under investigation acquires the legal condition of a party thereto. In consequence thereof, he shall have access to the record of the preliminary proceeding and every means of defense that the law provides, the moment the respective arrest warrant is executed." [FN63]

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[FN63] Supreme Court of Justice, Proposed Report of Justice Ismael Rodríguez Salazar, pp. 7 and 8, Section 22, pp. 175-176, November 16, 1993.  
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114. Bearing in mind that the victim is entitled to international protection for his human rights, the Government must ensure respect for so-called due process of law, in order to guarantee an adequate defense for those whose rights and duties are involved. In the opinion of the Commission, the fact that a procedural stage happens to be a secret preliminary proceeding or a preliminary hearing on merits is immaterial under the international law of human rights if such a proceeding ends in a decision that affects to varying degrees the situation of the person involved: loss of freedom and even --under Venezuelan positive law-- denial of release on probation. Put another way, preliminary hearings and secret preliminary proceedings are so closely associated with the criminal trial that to address them as separate would restrict and substantially weaken the protection afforded by due process of law to which all persons accused of an offense are entitled. By that token, a judicial decision that hinders, prohibits, or limits a person's right of defense at this stage of the proceeding constitutes a violation of Article 8(1) and 8(2)(d) of the Convention. [FN64]

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[FN64] It is interesting to observe that in the case of *Funke v. France*, the European Commission and Court of Human Rights applied Article 6(1) of the European Convention --similar to Article 8(1) of the American Convention-- to customs proceedings brought prior to the start of a criminal proceedings. In this case, "proceedings relating to interim orders connected with the main proceeding were brought by the customs authorities in order to obtain the evidence required to provide a solid basis for the charges (...). The temporal connection between these two proceedings shows that they were very closely related, as was the prosecution mounted against the petitioner, which depended on the prior decisions adopted in the customs proceedings." In consequence, both the Commission and the European Court of Human Rights decided that Article 6(1) was applicable in full (16 E.H.H.R. 297 (1993), paras. 44 and 60).  
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115. The Commission further observes two dissenting votes by Supreme Court Justice Hildegard Rondón de Sansó, in which she confirms what the Inter-American Commission has stated in respect of the right of defense of Reinaldo Figueredo Planchart. [FN65]

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[FN65] Supreme Court Justice, Hildegard Rondón de Sansó, in casting her dissenting votes of November 16, 1993 and May 30, 1996, stated, inter alia, the following:

According to the decision, there is no trial until an arrest warrant or an indictment has been issued; instead there are proceedings preparatory to that trial, in consequence whereof the accused is not entitled to defense counsel or attorneys, nor is he able to contest the charges brought against him. In the opinion of the dissenter, this conception clashes with modern public conscience of what is just and legal by perpetuating the fiction that an accused is not on trial, but the subject of a simple inquiry, on which basis he does not have full rights of defense.

In the opinion of the dissenter, should express laws establishing such a provision exist, they would run contrary to the most elementary protection of the rights inherent to the human person (...) In the opinion of the dissenter, a criminal proceeding starts with the issuance of an order to proceed, which is when the weight of the court's investigative proceeding is brought to bear on the criminal suspect, with all the consequences attendant thereon.

The dissenter finds that the aforementioned interpretation of the rules of criminal procedure creates situations of flagrant injustice by permitting thousands of individuals on trial to be completely deprived of any defense during a fundamental stage. As to the possibility of the attorneys for the accused to participate in the proceedings, in the dissenter's view they were legally entitled to participate on his behalf, on which basis the representation that they adduce may not be denied.

In light of all the foregoing considerations the dissenter finds that the Court should have heard the arguments presented by the attorneys for the accused and made their decision thereon, since she considers that they were fully entitled legally to represent him (...) The Court, moreover, should have revised its thesis for determining the moment at which the criminal trial commences, thereby defeating the inadmissible fiction that until an arrest warrant or an indictment has been issued the trial has not started and the accused may not avail himself of any means for his defense.

With respect to the final judgment of the Supreme Court of Justice of May 30, 1996, Justice Rondón de Sansó further stated, inter alia, that:

The decision is based on a series of suppositions, which, in the opinion of the dissenter, are contrary to law; some expressly established as such, and others on the basis of failure to pronounce on essential points that were at issue. In respect thereof, I consider it necessary to review, step by step, the main charges that were brought against those convicted today, which comprised the supposed "iter criminis" (process of the crime), in order to examine, approximately in the same order as the sequence of events, the fundamental points of law present in that process.

...

The dissenter cannot omit to outline the following facts:

1.- The dissenter observes that in the first three judgment dockets and in part of the fourth, essentially devoted to the part containing the decision (...) the evidence adduced by the defense is neither set out nor analyzed, which prevents one from knowing the replies that the defense made to the charges contained in the petitions, indictments, documentary evidence, and other evidence adduced.

2.- Continuing the line of observation of the foregoing paragraph, we ask ourselves, why are the arguments asserted during the accused's hearing and the document containing the decisions

not reproduced or cited?. However, procedural defects and lack of motive aside, the dissenter considers that aforementioned observations could constitute a violation of the right of defense, since respect for that right implies not only ensuring access to all the records; knowledge of the charges; the opportunity to reply to the charges; exercise of the right to bring evidence on his behalf; and, the right to challenge the evidence of the opposing party, but also, --and in particular -- the guarantee that the court shall analyze the arguments presented and contrast the opposing positions, failing which, the fact that the accused exercised the aforementioned rights would become both worthless and meaningless.

By the same token, the dissenter should mention that in discarding a series of items of evidence proffered by the defense, the judgment lists a number of documents which it regards as generically immaterial or irrelevant, without, however, providing its grounds for such an assessment, which again raises doubts over the observance of the relational principles applicable to all judgments, one of which is clarity of the reasons on which the decision is based.

By contrast, the judgment ascribes value to witnesses who gave narrative testimony, some without even mentioning the source from which they obtained their information. All of the foregoing suggests a biased judgment, given the unequal treatment of the parties.

From all of the aforementioned, the dissenter is obliged to recall the historic responsibility that all judicial officials have in the delicate task of dispensing justice, in a system such as ours, which essentially tends toward a literal interpretation of the law and demands, accordingly, that the reasons for a judgment appear in the record, and which understands that the foremost guarantee of the accused is the permanent presumption of innocence. Under such a system, the judge cannot, therefore, neglect in his judgment to confirm and verify what emerges from the record (emphasis in the original). Supreme Court of Justice, Caracas, Republic of Venezuela, Dissenting Vote of Hildegard Rondón de Sansó, November 16, 1993, pp. 194-203, and May 30, 1996, pp. 837, 862, 863, and 864.

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116. Upon examining the final judgment of the Supreme Court of Justice of May 30, 1996, the Commission finds that said tribunal does in effect disregard the arguments of Reinaldo Figueredo Planchart's defense counsel with respect to the violations of due process. Indeed, that judgment states, inter alia, that "the defense counsel of the accused Reinaldo Figueredo Planchart alleges (...) that due process was violated in the preliminary hearing on merits and in the preliminary proceeding stage, on the basis of breach of the right of defense and the right to a hearing, thereby denying their right to be presumed innocent." [FN66] The judgment of the Supreme Court goes on to reject those arguments, inter alia, by reason that "the above-submitted arguments of the defense are disproved by the factual and legal reasons that were set out in Chapter III of the present judgment." [FN67] However, careful reading of the abovementioned chapter reveals neither an allusion to the procedural rights of the victim, nor an analysis of the evidence adduced by the defense when permitted to do so by the aforesaid tribunal. [FN68]

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[FN66] Supreme Court of Justice, Judgment of May 30, 1996, op.cit., p.758.

[FN67] Supreme Court of Justice, Judgment of May 30, 1996, op.cit., p. 759.

[FN68] It should be recalled that Reinaldo Figueredo Planchart did not have access to the record, to the prosecutor's indictment, or to his right of defense by his attorney from the start of the

investigation until the issuance of the of the warrant for his arrest by the Supreme Court of Justice.

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117. In the light of the foregoing factual and legal reasoning, the Inter-American Commission finds that the Venezuelan Government bears international responsibility for the violations of Articles 8(1), 8(2)(d) and 25(1) in connection with Article 1(1) of the Convention to the detriment of Reinaldo Figueredo Planchart, based on the events that occurred in Caracas, Venezuela, between the month of November 1992, when he became the subject of an administrative investigation, and May 30, 1996, when the Supreme Court of Justice delivered a judgment convicting him. The record shows that from November 1992 to June 22, 1994, the accused did not have access to the aforementioned minimum guarantees of due process to which he was entitled by virtue of the international obligations assumed by Venezuela upon its ratification of the American Convention on August 9, 1977.

118. Right to be presumed innocent [article 8(2) of the Convention. Article 8(2) of the Convention provides, *inter alia*, that, "Every person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law." Of all the guarantees that pertain to the criminal justice, perhaps the most elementary is the right to be presumed innocent, which is expressly recognized without any reservation or exception by various international instruments on human rights, such as the Universal Declaration, the International Covenant on Civil and Political Rights, the American Declaration, and the American Convention.

119. This provision grants in favor of the accused the presumption that the latter must be considered innocent and be treated as such, until his criminal responsibility has been determined by a final judgment. The principle of presumption of innocence demands "that the conviction and, therefore, the application of the penalty may only be founded upon the assurance of the court regarding the existence of a punishable act attributable to the accused." [FN69] The judge upon whom it devolves to take cognizance of the indictment is under obligation to address the case without prejudgment and must on no account assume a priori the accused to be guilty. [FN70] On contrary, the American Convention requires that, in accordance with due process of law and with universally accepted principles of criminal law, the judge confine himself to determining criminal responsibility and to sentencing the accused based on his appraisal of the evidence to hand. The right to be presumed innocent has led modern criminal law to impose the general rule that all persons indicted in a criminal proceeding must be tried at liberty and that only by exception may the accused be deprived of his freedom.

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[FN69] Maier Julio B.J., *El Derecho Procesal Argentino*, Bs. As. (1989), p. 257.

[FN70] See in respect thereto, European Commission of Human Rights, Case 9037-80, X v. Switzerland, Decision of 5 May 1981, D.R. 24, p. 224.

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120. Given that the accused, Reinaldo Figueredo Planchart, was unable to exercise his right of defense from the start of the investigation against him until the issuance of the warrant for his

arrest, and that this judicial decision did not permit, at the time of the events, his release on probation or on bail,[FN71] the Commission considers that the right to be presumed innocent enshrined in Article 8(2) of the Convention was violated. The Commission regards as grave the fact that the decision to issue the order of imprisonment was made without the accused having had the opportunity to exercise his right of defense, or to have the benefit of the guarantees of due process to which he was fully entitled prior to the issuance of the warrant for his arrest.

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[FN71] As stated in the instant report, Article 103 of the Organic Law on Protection of Public Assets, which was applied in the instant case, provides, inter alia, that, "The measures in respect of imprisonment provided for in the instant Law shall be subject to effective compliance... Consequently, any persons prosecuted for the offences herein established or for offences connected thereto, shall enjoy neither the benefit of freedom on probation --that is on bail from a secure prison-- established in the Code of Criminal Trial Procedure..." (emphasis added).  
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121. In the case of *Minelli v. Switzerland*, the European Court of Human Rights has clearly defined how a Government may violate the right of an accused to be presume innocent:

In the Court's judgment, the presumption of innocence will be violated if, without the accused's having previously been proved guilty according to law and, notably, without his having had the opportunity of exercising his rights of defense, a judicial decision concerning him reflects an opinion that he is guilty.[FN72]

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[FN72] Eur. Ct. H. Rts., Case of *Minelli v. Switzerland*, Judgment of 25 March 1983, on violation of the presumption of innocence (Article 6(2) of the European Convention on Human Rights), in *Tribunal Europeo de Human Rights, 25 Años de Jurisprudencia 1959-1983, Cortes Generales, Madrid, Spain, p. 954*. In the specific case of Mr. Minelli, the Court found that the Government had violated Article 6(2) of the European Convention, similar to Article 8(2) of the American Convention, which recognizes the principle of presumption of innocence.  
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122. As in the *Minelli* case, the presumption of innocence was violated in the case sub lite by a judicial decision that deprived the accused of his liberty and, accordingly, reflected an opinion that that he was guilty, without his having had the opportunity of exercising his rights of defense. The decision of the Supreme Court of Justice of May 18, 1994, in whose 444 pages it issues a warrant for the arrest pending trial of Reinaldo Figueredo Planchart, readily reflects the opinion that he is guilty: "From the evidence outlined above there emerges firm indications of the guilt of the accused (...) Reinaldo Figueredo Planchart in the perpetration the crimes of generic misappropriation and fraudulent embezzlement of funds, committed in the above-described circumstances, provided for and punished in Articles 60 and 58, respectively, of the Organic Law on Protection of Public Assets. Based on the above considerations and in accordance with the considerations foregoing, the Supreme Court of Justice, sitting in plenary, administering justice in the name of the Republic, and by authority of the Law (...) orders the arrest pending trial (...)

of the citizens (...) above identified, for commission of the crimes of generic misappropriation and fraudulent embezzlement of funds... ."

123. In the opinion of the European Court of Human Rights, "a decision that amounts in substance to a determination of the accused's guilt without his having previously been proved guilty according to law and, in particular, without his having had an opportunity to exercise the rights of the defence"[FN73] constitutes a violation of the principles that recognize the presumption of innocence. The honorable European Court has also stated that, "it suffices that there is some reasoning suggesting that the court regards the accused as guilty"[FN74] to declare a Government to have violated the right to be presume innocent. Based on the latter analysis, the Commission further finds that in the days immediately following February 15, 1995, the date on which the Supreme Court of Justice issued an order of attachment of the defendants properties, Justice Rafael Alfonzo Guzmán said to the media, "that these measures (...) are ineffective in this particular case because precisely this type of offender and this type of crime have the effect of ensuring that nobody keeps property of any significant value in their own name, in order to avoid its attachment.."[FN75] The Commission further finds that the attorneys for the defense requested the recusation of this Justice but the recusation was disallowed by the Supreme Court of Justice. The Commission should also mention that these statements were made one year and three months prior to the conviction issued by Supreme Court of Justice on May 30, 1996, which, moreover, is signed and initialed by the aforementioned justice.

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[FN73] Eur. Ct. H. Rts., Case of Lutz, Englert and Nolkenbockhoff v. Federal Republic of Germany, Judgment of 25 August 1987, op.cit., p. 1166.

[FN74] Eur. Ct. H. Rts., Case of Minelli v. Switzerland, op.cit., p. 955.

[FN75] See paragraph 71 of the present report for these statements in greater detail. These statements appeared on p. 21 of El Universal newspaper, in Caracas, Venezuela, on February 16, 1995, p. 21.

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124. In the opinion of the Commission, the aforementioned comments invalidate the proceeding inasmuch as the forenamed justice not only disregards the presumption of innocence to which the accused is entitled by prejudging him as an "offender" prior to the conviction, but also acts as judge and party, and injures the honor and reputation of the alleged guilty party. By the same token, the Commission considers that the exhibition of persons on trial across the mass media during prime-time viewing hours, as occurred in the case sub lite,[FN76] induces public opinion to prejudge the guilt of those persons and constitutes a practice at odds with the most basic standards of due process. All the facts set forth in this chapter permit the Commission to conclude that the Venezuelan Government bears international responsibility for violation of Article 8(2) of the Convention, in connection with Article 1(1) of that international instrument.

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[FN76] The public statements by Justice Rafael Alfonzo Guzmán were made on Friday, February 17, 1995, on the 8:00 p.m. news program on Channel 10, owned by TELEVEN.

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125. Right to prior notification in detail of the charges; right of the defense to examine witnesses; and right of the parties to proceedings with full equality [article 8(2)(b)(f) of the Cnvention].- According to Article 8(2), clauses (b) and (f) of the American Convention, every person accused of a criminal offense has the right during the proceedings, with full equality, to prior notification in detail of the charges against him, and to "examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts." These are fundamental guarantees of the right to a fair trial, since, as the European Court of Human Rights has pointed out, "there must exist a reasonable balance between the public's interest in punishment and repression of crime, which is served by the admission of the widest possible range of incriminating evidence, and the right of the accused or defendant effectively to disprove that evidence. When incriminating testimony which is submitted as evidence belongs to anonymous witnesses, or when witnesses refuse to appear at a hearing, as a result of which the defense is unable to cross-examine facts stated by a witness, the European Court has found that such conduct violates, to the detriment of the accused, the provision contained in Article 6, paragraph 3 of the European Convention on Human Rights."[FN77]

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[FN77] Eur. Ct. H. Rts., *Bonisch v. Austria* (1985), Series A, N° 92; *Kostovski v. Netherlands* (1989), Series A, N° 166; and *Urterpertinger v. Austria* (1986), Series A, N° 110.

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126. The record shows that between March 11, 1993, the date on which the Attorney General of the Republic filed an indictment and requested a preliminary hearing on merits before the Supreme Court of Justice, and June 22, 1994, --after the issuance of the warrant for arrest without probation-- the accused did not have access to a copy of the prosecutor's indictment, nor did he have the assistance of an attorney for his defense at the interrogatories to which he was summoned. It is also shown that the accused did not have access to the report and its 12 annexes drawn up against him by the Comptroller General in November 1992, in spite of repeated requests by the interested party alleging his right of defense. The record also shows the decision of the Supreme Court of Justice of May 11, 1993, refusing distribution of copies of the prosecutor's complaint and the respective record, as well as the same court's decision of May 26, 1993, whereby it orders transmittal to the then-President Carlos Andrés Pérez of "a complete copy of the indictment and of its accompanying documents." It is also shown that on November 16, 1993, the Supreme Court of Justice denied a request to exclude the Attorney General of the Republic from the trial on the basis of ensuring a proceeding with full equality for the parties, since the defense did not have access to the minutes of the preliminary proceedings. That court's interpretation was that during the preliminary proceeding the accused was not entitled either to the prosecutor's indictment, to the minutes of the preliminary proceedings, to a defense attorney, or to present witnesses in his defense or cross-examine prosecution witnesses. The record shows, moreover, that the accused Figueredo Planchart was questioned in the presence of the Attorney General of the Republic by the Supreme Court of Justice on September 29, 1993, without the assistance of a defense attorney and without being able to present evidence in his defense.

127. In the Commission's opinion, a criminal suspect must have a real and effective right to respond to charges and evidence brought by the Office of the Attorney General. In order for this right to be effective it must be available to the party concerned at the initial stages of a

proceeding. Failing that, mistaken or unfair charges brought by the Office of the Attorney General or false testimony given by witnesses for the prosecution may lead to the mandatory and prolonged imprisonment of the criminal suspect, without his having had the opportunity to deny, much less challenge, the incriminating testimony. The effectiveness of the principle of equality in proceedings is ensured by according the defense the right to question witnesses and present evidence in the same conditions as the prosecution. Only then may the defense fairly submit its case and all the relevant aspects of the case come to light.

128. The Commission finds that none of the abovementioned principles of due process were observed in the case sub lite. Indeed, the limitations imposed on the attorneys defending the accused, the inability to present evidence in his defense, and the lack of access to the record of the indictment prior to the issuance of the arrest warrant, violate the principles enshrined in Article 8(2)(b) and (f) of the Convention. In the case on record the accused was not granted -- during the preliminary proceeding-- a real opportunity of either knowing or responding to the charges brought and the evidence adduced by the other party. During the entire preliminary proceeding, which lasted more than a year, the Supreme Court of Justice of Venezuela kept secret both the prosecutor's indictment and the report of the Comptroller. By the time the accused's attorneys were finally able to apprise themselves of the contents of the aforementioned documents a warrant had already been issued for his arrest. That court also violated the right of the accused to a proceeding with full equality, inasmuch as he was questioned in the presence of the prosecutor while his defense counsel was excluded. In consequence, the Venezuelan Government bears international responsibility for violations of Article 8(2)(b) and (f) of the Convention in connection with Article 1(1) of the above-cited international instrument.

129. Right to appeal the judgment to a higher court [Article 8(2)(h) of the Convention]. Article 8(2)(h) of the American Convention provides that Every person accused of a criminal offense has the right, with full equality, "to appeal the judgment to a higher court ." This right constitutes a fundamental requirement of due process and, furthermore, in accordance with Article 27(2) of the Convention, may not be derogated. In the opinion of the Commission, the right to appeal a judgment entails a review of the facts of the case, a complete study of the trial, which implies real guarantees to the accused persons that their case will be heard and respect for their rights ensured, in conformity with the principles of due process provided in Article 8 of the Convention. This right does not provide exceptions of any nature. In other words, a Government cannot plead its domestic law in order to avoid compliance with this provision.[FN78] The Inter-American Court defines this concept in one of its more recent decisions:

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[FN78] The domestic laws of a State cannot supercede this international commitment. As the U.N. Human Rights Committee has recognized in interpreting Article 14 (5) --similar to 8(2).h of the Convention--, it "is not intended to leave the very existence of the right of review to the discretion of the States parties, since the rights are those recognized by the Covenant, and not merely those recognized by domestic law." *Salgar v. Colombia*, N° 64/179 (1982), reproduced in Human Rights Committee, Selected Decisions under the Optional Protocol, pp. 127-30, para. 10.4. Article 14(5) of the International Covenant on Civil and Political Rights provides the following: "Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law."

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The right to appeal the judgment enshrined by the Convention is not satisfied by the mere existence of an organ of superior instance to the one that tried and convicted the accused, to which the latter has, or may have, access. In order for there to be a real review of the judgment, in the sense required by the Convention, the superior court must satisfy the jurisdictional characteristics that enable it legitimately to take cognizance of the concrete case.[FN79]

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[FN79] Inter-Am.Ct.H.R., Case of Castillo Petruzzi et al. v. Peru, Judgment of May 30, 1999, para. 161.

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130. The Commission has already said in the instant report that the Supreme Court of Justice was not the competent tribunal to try and convict Reinaldo Figueredo Planchart in a single-court proceeding.[FN80] Under Venezuelan positive law, the Superior Tribunal for the Protection of Public Assets was the competent organ to try the accused in its capacity as the court of first instance, which would have enabled him to appeal to a superior tribunal should the judgment have been unfavorable. In the event, that did not occur, given that the Supreme Court convicted him on May 30, 1996. In relation thereto, the Inter-American Court has also stated that "the criminal trial is a single continuous proceeding that passes through various stages, including that which corresponds to the first instance and those pertaining to subsequent instances. In consequence, the concept of natural judge and the principle of due process of law are in effect throughout all these stages and extend to the different jurisdictional levels of the trial. If the judge (...) does not satisfy the characteristics of a natural judge, the stage of the trial developed before him cannot be regarded as legitimate and valid."[FN81]

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[FN80] See paragraph 94 herein: THE RIGHT TO A NATURAL JUDGE AND COMPETENT TRIBUNAL

[FN81] Inter-Am.Ct.H.R., Case of Castillo Petruzzi et al. v. Peru, op.cit., para. 161.

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131. The foregoing coupled with the fact that Article 211 of the Constitution of the State of Venezuela provides that, "[t]he Supreme Court of Justice is the highest bench in the Republic. No appeals whatsoever shall be heard or admitted against its decisions," and analyzed in conjunction with the note from the Venezuelan Government of February 6, 1997, in which it states, inter alia, that "there are no other remedies of internal jurisdiction to be interposed" against the conviction handed down by that tribunal, permits the Commission to conclude that the Venezuelan Government also breached Article 8(2)(h) of the Convention, in connection with Article 1(1) of the above-cited international instrument.

132. Right to a public proceeding [Article 8(5) of the Convention].- Article 8(5) of the Convention provides that, "Criminal proceedings shall be public, except insofar as may be necessary to protect the interests of justice." The Inter-American Commission has stated in that regard that:

Having public trials is not only an essential guarantee of due process, but also a general principle of law. Having public proceedings is a "fundamental principle of modern procedure, opposed to inquisitorial secrecy, which establishes, as a supreme guarantee for the litigants, for the finding of the truth, and for fair judgments, that the investigation of the cases...be known not only to the parties and those who intervene in proceedings, but to everyone in general.[FN82]

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[FN82] IACHR, 1998 Annual Report, Chapter IV, Human Rights Developments in the Region, p. 1124.

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133. The case law of the European Court of Human Rights is also consistent on this point:

The public nature of proceedings protects litigants from the secret administration of justice not checked by public opinion; it is also one of the measures for preserving confidence before the courts and tribunals, by securing transparent administration of justice. Public procedure helps ensure the aim of the right to a fair trial, whose guarantee is one of the fundamental pillars of any democratic society.[FN83]

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[FN83] Eur. Ct. H.R., Axen Case, Judgment of December 8, 1983, Publicity of Judicial Procedure, Tribunal Europeo de Derechos Humanos, 25 Años de Jurisprudencia 1959-1983, Publicación de las Cortes Generales, Printed at Closas-Orcoyen, S.L., Madrid, Spain, 1981.

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134. The Commission observes that at the time of the events, an ordinary criminal proceeding could be initiated ex officio, by petition, or by accusation; however, the initial inquiry, once opened, was secret and of indefinite duration in cases where there was no detainee.[FN84] In the case sub lite it is amply shown that from the start of the investigations in November 1992, until June 22, 1994, --following the issuance of the arrest warrant-- the accused did not have access to the record containing the charges brought either by the Comptroller General or the prosecutor. As a result of the secrecy of the first stage of the proceeding --let us call it the first stage in spite of the almost two years that elapsed-- the accused did not have access to the proceeding and, therefore, could not help to shed light on the facts. Indeed, the fact that Venezuelan criminal law at the time provided for the secrecy of investigations in preliminary proceedings, not only made it impossible for the interested party to know the truth of what occurred in the investigation, but also forbade his cooperation therewith or participation therein. The interest of the accused in seeing justice done in his case can contribute depth to the investigation and to clarification of the facts. Thus, at this crucial stage of the investigation, when the memory of the witnesses is fresh and when it is still possible for experts to perform tests or to carry out judicial inspections that make it possible to gather evidence in defense of the accused, the lack of access to the proceeding instituted by the State has contributed to a lack of transparency in the proceedings in this case.

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[FN84] Article 73 of the old Code of Criminal Trial Procedure: Preliminary investigation proceedings, whether instituted ex officio or by petition of the injured party, shall be secret, except from the Representative of the Office of the Attorney General, until declared concluded. Neither shall they be secret from the accused against whom an arrest warrant is served and for the accuser, in cases where the law demands the appearance for questioning of the accused party or the presentation of the accusation by the injured party, from the issuance by the Tribunal of the warrant of arrest or the indictment and from its issuance or confirmation of the decisions referred to by Articles 99, 109 in its last paragraph, and 206. Art. 208.- When the preliminary inquiry appears to confirm the commission of a punishable act, but there emerge no indications as to who its author might be, the inquiry shall be kept open until he is discovered (emphasis added).

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135. It is pertinent to mention in this context that the Venezuelan Government has corrected this situation by promulgating the new Organic Code of Criminal Procedure, which entered into force on July 1, 1999. Under this new code, the Office of the Attorney General has sole control over investigations in crimes against public order, thereby eliminating secret preliminary proceedings. The purposes article of the new Code of Criminal Procedure criticizes secrecy of preliminary proceedings as follows:

... examination of the legal framework (legality) and effectiveness (reality) of the body of laws on criminal procedure reveals that it violates basic procedural principles (...). The Venezuelan criminal trial, with its mixed origins, was gradually corrupted (from a system of judicial investigation to one of police investigation and the possibility of admitting as evidence information obtained in the preliminary proceeding), to the extent where it became an almost purely inquisitorial proceeding. The preliminary proceeding, which was a phase preparatory to the trial proper, became the principle phase, where the police prepare the file of the case, detain the "alleged" author of the crime and, furthermore, in violation of express legal provisions, publicly censure him through the mass media; and the trial proper, bereft of any substantial content, became a meaningless ritual: today, the criminal trial ends, materially speaking, with the issuance of the warrant of arrest.

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This situation considered, the need arises to update Venezuelan procedural law and to replace a system of legal procedure, which is said to be "mixed" but is fundamentally inquisitorial (a system characteristic of absolutist states), with one in which the parties have equal status and the judge acts as a disinterested third party.

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Starting with the area of criminal justice, the aim is to provide the citizenry in each case with a concrete response --on a fixed date-- of justice dispensed swiftly and with a sense of equity.

.....

The accuser and the accused, appear before the judge with equal rights and obligations, and the case is, generally speaking, judged with the accused at liberty until judgment is pronounced.

.....

Given that criminal matters are too important to be addressed secretly, all proceedings, except as provided otherwise by law, must be conducted publicly, inasmuch as this constitutes a guarantee of the legality and fairness of the decision, permits the ordinary citizen to become more familiar

with the system of justice administration, and reinforces his faith in it, which, in turn, represents a form of democratic control over legal proceedings. Thus, in protecting the parties from a system of justice removed from public control, one of the principles of due process is guaranteed.[FN85]

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[FN85] Código Orgánico Procesal Penal y Exposición de Motivos, Oficial Gazette N° 5208 of January 23, 1998, Editorial Buchivacoa, Caracas, Venezuela, pp. 9, 12, 18, and 32.

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136. The Inter-American Commission regards as positive the fact that the Venezuelan Government has corrected legal provisions that were incompatible with the purpose and aims of the American Convention. However, irrespective of the fact that that legislation has been amended in order to make it compatible with the obligations adopted by the Government in the framework of the above-cited instrument, the fact remains that the application of the old Code of Criminal Trial Procedure in the instant case had negative repercussions on the procedural rights of the victim, whose right to the guarantees of due process of law and, by that token, to a fair trial, was violated. Accordingly, the Venezuelan Government also bears international responsibility for violation of Article 8(5) of the Convention in connection with Article 1(1) of the above-cited instrument.

137. Right to an impartial tribunal [Article 8(1) of the Convention]. Article 8(1) of the Convention provides that every person has the right to a hearing by an impartial tribunal. The scope of the term “independent” has been analyzed, developed and applied by international jurisprudence on human rights. The European Court of Human Rights, for instance, has developed abundant and coherent case law on this subject.[FN86] Analysis of that practice permits one to surmise that certain structural and functional conditions must be satisfied, in order to determine a tribunal to be independent.

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[FN86] Principally in the following cases: *Sramek v. Austria*, Series A, N° 84; *Campbell and Fell v. United Kingdom*, Series A, N° 39; *Ringeinsen v. Austria*, Series A, N° 13; *Engel v. Netherlands*, Series A, N° 22; and *Schiesser v. Switzerland*, Series A, N° 78.

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138. Impartiality supposes that the judge or tribunal does not have any preconceptions on the case sub lite and, in particular, that he or it does not assume the accused to be guilty. For the European Court of Human Rights the impartiality of the judge is composed of subjective and objective elements. The subjective impartiality of the judge is assumed in a given case until proved otherwise. His objective impartiality, for its part, requires that the court offer guarantees sufficient to exclude any legitimate doubt in respect of its impartiality in the proceeding.[FN87] The European Court further adds that, “even appearances may be of a certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused. What is decisive is whether this fear can be regarded as objectively justified.”[FN88] In sum, the aforesaid court concluded that, “justice must not only be done; it must also be seen to be done.”[FN89]

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[FN87] See, for example, the Piersack Case, Judgment of 1 October 1982, Series A, N° 5.

[FN88] Eur. Ct. H. Rts., Padovani v. Italy, Judgment of 26 February 1993, Series A, Vol. 257-B al H, para. 27.

[FN89] Eur. Ct. H. Rts., De Cubber v. Belgium, 7 EHHR 236, para. 26 (1984) citing Delcourt v. Belgium, 1 EHHR 355, para. 31 (1970).  
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139. Bearing these principles in mind, the Commission finds that the different stages of the proceedings in this case have been plagued by numerous irregularities that raise serious doubts about the independence and impartiality of the government organs tasked with trying the case of Reinaldo Figueredo Planchart. Following, the Commission lists and examines the irregularities committed:

a. El Nacional newspaper of March 16, 1993, --pages A-1 and D-1-- reports on the investigations of Reinaldo Figueredo Planchart (hereinafter "RFP") carried out by the Office of the Comptroller General of the Republic. It should be borne in mind that this government organ, on March 17, 1993, refused RFP a copy of the report with 12 annexes that it had drawn up. It should also be borne in mind that on the day after this press article, that is March 17, 1993, the Supreme Court of Justice admitted the criminal indictment filed by the Attorney General of the Republic against RFP.

b. El Nacional newspaper of May 5, 1993 --page D-1-- and El Universal newspaper of May 6, 1993, published the proposed judgment of the Supreme Court of Justice citing the grounds for prosecuting RFP. It should be mentioned that RFP still did not have access to the record or the right to defense counsel and that on May 11, 1993, the Supreme Court denied access to a copy of the prosecutor's indictment on the basis that that is applicable only "when it has been declared beforehand that there are grounds for prosecution." It is also important to note that 15 days after this news was published by the press, that is, May 20, 1993, the Supreme Court declared that there were grounds for the prosecution of RFP.

c. El Universal newspaper of April 15 and 30, 1994 published part of the text that contains the warrant for the arrest of RFP. It should be mentioned that RFP only had access to the record and, therefore, the right to be assisted by an attorney in his defense in the interrogatories, from June 22, 1994. It is important to underscore, furthermore, that the attorneys of RFP filed a petition with the Supreme Court of Justice denouncing the leak. The Supreme Court issued a warrant for the arrest of RFP on May 18, 1994, three weeks after the aforesaid leak.

d. On February 16, 1995, Supreme Court Justice Rafael Alfonzo Guzmán gave statements to El Universal --page 21--, making value judgments on the accused in this case and labeling them as "offenders." [FN90] These same statements appeared on Friday, February 17, 1995, on the 8:00 p.m. news program broadcast by Channel 10, which is owned by TELEVEN. The attorneys for RFP filed a request for recusation of said justice. However, the recusation was disallowed. It should be mentioned that this same justice was subsequently elected President of the Supreme Court, and that at the time of making his statements a conviction had not yet been issued.

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[FN90] See paragraph 71 herein.

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e. El Nacional newspaper of January 25, 1996, published an interview with the then-President of the Republic Rafael Caldera in which he considered that to grant a pardon the accused persons would be a failure to recognize "the conviction that it behooves the Supreme Court of Justice to hand down." The Supreme Court had yet to pass judgment on the case.

f. El Nacional newspaper of February 1, 1996, published statements made by the then-Prosecutor General of the Republic, Jesús Petit Da Costa, in which he regards the lodging of a petition with the IACHR as a method used by the accused to exert pressure on the Government.

g. El Nacional newspaper of April 19, 1996, transcribed extracts from the proposed judgment convicting RFP. Two weeks later, on May 30, 1996, the Supreme Court of Justice issued its final judgment on the case, sentencing RFP to two years and four months imprisonment. It should be mentioned that the text of the judgment matched that published in the press.

140. In the opinion of the Commission, the leaks to the press by the organs in charge of administration of justice in Venezuela before the accused could exercise his right of defense gravely corrupt the proceeding and cast serious doubt on the impartiality of the judicial authorities. These facts, coupled with the statements made by a number of justices in which they prejudge or advance judgment, and refer to the accused as an offender prior to his conviction, demonstrate the bias of that judicial body toward one of the parties in the proceeding --in this case the Government-- and disqualifies it as an independent and impartial tribunal in accordance with the principles set forth by the American Convention.

141. At this stage of its analysis, the Commission cannot omit to reproduce part of the dissenting opinion of Supreme Court Justice Hildegard Rondón de Sansó, who, in disagreeing with the majority decision to convict Reinaldo Figueredo Planchart, stated, inter alia, that:

Finally, the dissenter cannot neglect to mention the notion of the proceeding outside the proceeding, which has been a determining factor in this trial, where everything, even the final decision, was debated in the press prior to publication.

In this external proceeding, the manipulation of public opinion sought above all to increase the charges against the accused (...) in order to condition that opinion to demand decisions on acts alien to the trial. The layman does not know that the judge decides "secundum allegata et probata", and that the only charges on which he pronounces judgment are those that were presented and appear in the record. Unaware of this fact, while being informed of other charges being constantly reported on outside the proceeding, public opinion is manipulated to react, in the event of an acquittal, both against the accused and against the judge.

If one takes account of all the legal considerations and those relating to the factual evidence that surrounded the formation of this decision, and one recalls the pressure that the Head of Government himself exerted on the substance thereof, in demanding a conviction by the Supreme Court, one can only say that the Supreme Court of Justice has again squandered an

opportunity to elevate its standing in the eyes of the country and of the international legal community by delivering a judgment in accordance to law and justice.[FN91]

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[FN91] Supreme Court of Justice, Judgment of May 30, 1996, Caracas, Venezuela, Dissenting Vote of Justice Hildegard Rondón de Sansó, pp. 866 and 867.

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142. Justice Alfredo Ducharne Alonzo also referred to the aforesaid judgment, indicating that, "A decision has been made --in the view of the dissenting Justice-- under the distorting external influences of public opinion and the political ingredient." [FN92]

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[FN92] Supreme Court of Justice, Judgment of May 30, 1996, op.cit., p. 820.

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143. The European Commission of Human Rights has stated that "the Government has the obligation to ensure that everyone subject to its jurisdiction and accused of a crime has a fair trial and not what is sometimes termed a trial by the press." [FN93] That Commission also declared that "a virulent press campaign can adversely affect the fairness of the proceeding and entail the responsibility of the Government, particularly when it is encouraged by one of the organs of the Government itself." [FN94]

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[FN93] Eur. Comm. H. Rts., Case of Crociani v. Italy, 22 D.R. 147, 228 (1980).

[FN94] Eur. Comm. H. Rts., Case of Jespers v. Belgium, 22 D.R. 100, 127 (1980).

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144. Like the European Commission, the Inter-American Commission considers that biased publicity highlights even more starkly the absence of transparency and lack of procedural equality in the case sub lite, since the administrative authority, the prosecutor, the judges, and even the written and televised press had access to the record, while the interested party, who was harmed by his failure to receive a fair trial, did not. Furthermore, these indications, taken in conjunction, are more than sufficient for it legitimately to appear that the government organs entrusted with substantiating the accusation made against Reinaldo Figueredo Planchart lacked impartiality. Accordingly, Venezuela, as a state party to the Convention, failed to fulfill its positive duty to ensure for the accused the guarantees of due process of law to which he was entitled. Therefore, it violated Article 8(1) of the above-cited international instrument.

145. As the Inter-American Court has found,

...it is beyond any question of doubt that the State has the right and duty to guarantee its own security. Nor can it be disputed that the whole of society suffers as a result of infringements on its legal order. Nevertheless, however grave certain acts may be, and as guilty as certain offenders may prove, it is inadmissible for power to be wielded without restraint or for the Government to avail itself of any procedure for accomplishing its aims without abiding by the

law or morals. There is wide recognition of the primacy of human rights, which the State cannot ignore without violating.[FN95]

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[FN95] Inter-Am.Ct.H.R., Castillo Petruzzi et al. v. Peru, Judgment of May 30, 1999, para. 204.

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146. The Commission holds that the Government, in subjecting the victim in the instant case to proceedings in which the principles and guarantees of due process enshrined in the American Convention were not respected, has breached its obligation to respect the rights and freedoms recognized therein and to guarantee free and full exercise of those rights and freedoms, as Article 1(1) of the Convention provides.

#### IV. RIGHT TO HUMANE TREATMENT [ARTICLE 5 OF THE CONVENTION]

147. In their original communication of May 23, 1994, the petitioners asserted that the Venezuelan Government violated Articles 5(1), (2), and (4) of the American Convention to the detriment of Reinaldo Figueredo Planchart. The precise wording of those articles is as follows:

##### Article 5. Right to Humane Treatment

1. Every person has the right to have his physical, mental, and moral integrity respected.
2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.
4. Accused persons shall, save in exceptional circumstances, be segregated from convicted persons, and shall be subject to separate treatment appropriate to their status as unconvicted persons.

148. The Commission observes that the petitioner requested the censure of the Government on the basis that he was hypothetically served with the warrant issued for his arrest. Indeed, the petitioner stated, inter alia, "As is public knowledge, not only are conditions unbelievably unsanitary and overcrowded in detention centers for remand prisoners in Venezuela, known as holding centers (retenes) or judicial internment centers, they are also effectively under the command of the most violent habitual criminals and totally beyond the control of the authorities. (...) It was determined that the accused in this trial were to be sent to one of these judicial internment centers. The only exception being the accused persons over 70 years of age (...). This is not the case with Figueredo Planchart, although it is with the other two accused persons mentioned."[FN96]

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[FN96] Communication of the petitioners of May 23, 1994.

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149. Given that Reinaldo Figueredo Planchart left the country on May 18, 1994, before he could be served with the warrant for his arrest, and that the hypothesis to which he alluded in his

original petition did not materialize because his trial continued in absentia, the Commission concludes that the Venezuelan Government is not responsible for violation of the accused's right to humane treatment, and so it finds.

#### V. PROCEEDINGS SUBSEQUENT TO REPORT N° 85/99

150. On September 29, 1999, the Commission adopted Report N° 85/99 under Article 50 of the American Convention. In that report, the Commission concluded that the Venezuelan Government had violated Reinaldo Figueredo Planchart's right to the judicial guarantees contained in Articles 8(1), 8(2)b, (d), (f), (h), and 8(5) of the American Convention, as well as his right to judicial protection enshrined in Article 25(1) of the above-cited international instrument. All the foregoing was on the basis of the lack of due process in his trial in Caracas, Venezuela, from November 1992 until May 1996, when the Supreme Court of Justice sentenced him to two years and four months imprisonment. The Commission further concluded that the Venezuelan Government failed to fulfill its obligation to respect and guarantee these rights contained in the Convention, or to adopt the measures necessary to avert these violations in pursuance to Article 1(1) of the aforementioned treaty. Lastly, the Commission concluded that the Government had not violated the victim's right to humane treatment recognized in Article 5 of the Convention.

151. Based on the analysis and conclusions contained in that report, the Commission recommended that the Government "(1) Vacate the proceedings instituted against Reinaldo Figueredo Planchart both before the Office of the Comptroller General of the Republic and before the Supreme Court of Justice, and grant him a new trial before an ordinary court of first instance with full observance of the guarantees of due process; (2) Rescind the warrants outstanding for the arrest of Reinaldo Figueredo Planchart under Venezuelan domestic jurisdiction; and (3) Adopt the necessary measures to provide adequate and timely compensation to Reinaldo Figueredo Planchart, including just satisfaction for the human rights violations established herein."

152. The Commission transmitted the report to the Government on October 13, 1999, granting it a period of two months to comply with the foregoing recommendations. On December 3, 1999, the Government requested an extension of 60 days "to examine the preliminary report on the case in question." The Government further stated that, "such a petition stems from the request by Sr. Figueredo's lawyer, Douglas Cassel, to hold a meeting with Foreign Minister José Vicente Rangel, in order to study the possibility of reaching a friendly settlement."

153. In its note of December 8, 1999, the Commission acknowledged receipt of the Government's communication and further mentioned that, "based on the fact that the three-month period provided for in Article 51(1) of the Convention expires on January 13, 2000, I wish to inform Your Excellency that the Commission will be pleased to consider an extension on the proviso that the Government indicate its agreement that that request suspend the deadline for the Commission to adopt the decision to refer this case to the Inter-American Court of Human Rights under the terms of Article 51(1) of the Convention."

154. In a note dated December 8, 1999, the Government accepted the Commission's conditions and the latter in a communication of the same date informed the Government that, "the two additional months granted to the Government will conclude on February 13, 2000, and the deadline established in Article 51(1) of the Convention for referring this case to the Court will expire on March 13, 2000."

155. On February 8, 2000, the petitioner informed the Commission that, "in spite of the efforts made following the adoption of the Commission's report under Article 50 on this case, the parties have been unable thus far to reach a friendly settlement, nor is there any likelihood thereof given the current status of the discussions. Accordingly, although Mr. Figueredo remains willing in good faith to negotiate a fair and reasonable settlement in this case, I have no option but to request the Commission to refer the case to the Inter-American Court of Human Rights."

156. The additional period granted by the Commission to the Government expired on February 13, 2000, without the latter complying with its recommendations or making any observations to Report N° 85/99. Consequently, following, the Commission reiterates its conclusions and recommendations to the Government of Venezuela.

## VI. CONCLUSIONS

157. The Government of Venezuela is responsible for violation of the following rights protected in the American Convention on Human Rights: the right to a fair trial (Article 8(1), 8(2)(b), (d), (f), (h), and 8(5)) and the right to judicial protection (Article 25(1)), as a result of the events that occurred in Caracas, Venezuela, starting in November 1992, the month in which an administrative proceeding was instituted ex officio against Reinaldo Figueredo Planchart and ending with the conviction delivered by the Supreme Court of Justice on May 30, 1996, without respect having been shown for the guarantees of due process to which the accused was entitled.

158. The Government of Venezuela has failed to fulfill its obligations to respect human rights and guarantees imposed by Article 1(1) of the American Convention, to which Venezuela became a state party on August 9, 1977.

159. The Government of Venezuela is not responsible for violation of the right of Reinaldo Figueredo Planchart to humane treatment --Article 5(1), (2), and (4) of the American Convention.

## VII. RECOMMENDATIONS

Based on the analysis and conclusions contained in the instant report,

**THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS REITERATES THE FOLLOWING RECOMMENDATIONS TO THE VENEZUELAN GOVERNMENT:**

1. To vacate the proceedings instituted against Reinaldo Figueredo Planchart both before the Office of the Comptroller General of the Republic and before the Supreme Court of Justice,

and grant him a new trial before an ordinary court of first instance with full observance of the guarantees of due process.

2. To rescind the warrants outstanding for the arrest of Reinaldo Figueredo Planchart under Venezuelan domestic jurisdiction.

3. To adopt the necessary measures to provide adequate and timely compensation to Reinaldo Figueredo Planchart, including just satisfaction for the human rights violations established herein

## VIII. PUBLICATION

160. On March 7, 2000, the Commission sent the State Report N° 20/00, which it had adopted in accordance with Article 51 of the Convention during its 106th regular session. The Commission gave the State a month in which to solve the situation that had been denounced. That report was also sent on the same date to the petitioner, who was advised that it was confidential until such time as the Commission should decide to publish it.

161. In a note to the Commission dated April 3, 2000, the petitioner acknowledged receipt of Report N° 20/00 and requested inter alia that “the Commission publish the report on the instant case and include it in its next Annual Report. The State has failed to comply with any of the Commission’s recommendations, despite having received them six months ago, in October 1999, and despite the petitioner’s efforts to reach a friendly settlement of the matter. Neither the flawed administrative and judicial proceedings have been vacated, as the Commission had recommended, nor is there any likelihood that this will happen; the arrest warrants pending have not been revoked; and no reparation has been made to Mr. Figueredo, nor are there any signs that this will happen. Given this failure of the State to comply with the Commission’s recommendations, publication of the report on this case in the Annual Report would constitute a measure of moral reparation granted by the Commission, above all because the violations of his human rights have done grave harm to Mr. Figueredo’s good name. It is important that this report be published as soon as possible, in the 1999 Annual report, because six years have passed since the petition was filed with the Commission in May 1994. Moreover, the report contains valuable jurisprudence on the subject of due process in criminal proceedings. Publishing it could therefore make a positive contribution to reforms of criminal proceedings under way in many countries in the Hemisphere.”

162. The State neither replied to the report of the Commission nor followed its recommendations.

163. Accordingly and pursuant to the foregoing considerations, and in conformity with Article 51(3) of the American Convention and Article 48 of its Regulations, the Commission decides to reiterate the precedent conclusions and recommendations, and to make this Report public, and to include it in its Annual Report to the General Assembly of the Organization of American States. The Commission, pursuant to its mandate, shall continue evaluating the measures taken by the Venezuelan State with respect to the recommendations at issue, until they have been fully fulfilled.

Done and signed by the Inter-American Commission on Human Rights, on the 13 day of the month of April 2000. (Signed): Hélio Bicudo, Chairman; Claudio Grossman, First Vice-chairman; Juan Méndez, Second Vice-Chairman; Commissioners Marta Altolaguirre, Peter Laurie, and Julio Prado Vallejo.